

Michigan Journal of International Law

Volume 29 | Issue 3

2008

Competing Legal Cultures and Legal Reform: The Battle of Chile

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Recommended Citation

James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501 (2008).

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COMPETING LEGAL CULTURES AND LEGAL REFORM: THE BATTLE OF CHILE

James M. Cooper*

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I. INTRODUCTION

In the Centro de Justicia in San Miguel, a working class suburb in southern Santiago, Chile's capital city, stand a number of new buildings, many of which feature courtrooms, detention facilities, and lawyers' offices. At the entrance of each building is an information kiosk, and at each kiosk sits a stack of comic books from a series called *El Juicio y la Verdad* (*The Trial and the Truth*) featuring the two titles *El Estado Caperucita Roja y el Lobo* (*The State and Little Red Riding Hood against the Wolf*) and *El Estado Blanca Nieves & la Reina* (*The State and Snow White vs. the Queen*). In the comic, the Big Bad Wolf is tried in a court that utilizes new criminal procedures that were implemented in Santiago in June 2005. On the back of the comic book, beside the logo for the Chilean Ministry of Justice, is the logo of the German Agency for

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Technical Cooperation (GTZ),¹ which developed and produced the comic book.

One and a half hours away by automobile lies the port city of Valparaíso. At the police station near the port, a cardboard model of a house rests beside the intake desk of the *Carabineros*, the national police. The model, “La Casa de la Justicia,” is assembled like a toy model building. It is designed as a children’s game, like Chutes and Ladders, and guides the players through the steps of a criminal proceeding in the judicial system to which Chile has transitioned since 2000. New procedural stages, including appearances before the *Juez de Garantía* and *salidas alternativas* (alternative sentencing and diversion programs) are presented as part of the game. Like the comic books in Santiago, “La Casa de la Justicia” is produced by the justice project at GTZ in partnership with the Chilean Ministry of Justice.² Characteristically, the house boasts the same Teutonic green-grey colored architecture that dots the Ninth and Tenth regions of Chile—areas populated by Germans after the 1880s. “La Casa de la Justicia” helps victims of crimes, witnesses, and the accused understand their respective roles in the criminal legal procedure.

In 1998, GTZ began its very successful rule of law project in Chile. It hired experts to offer alternative ideas, methodologies, curricula, sources, training, procedures, and public education programming to institutions in the Chilean legal sector.³ This outreach began during a time when U.S. influence among Latin America’s policy-making elite⁴ waned.⁵

1. Deutsche Gesellschaft für Technische Zusammenarbeit GmbH [German Agency for Technical Cooperation] [GTZ], <http://www.gtz.de/en/> (last visited May 15, 2008).

2. See GTZ Proyecto Reforma Judicial Chile [GTZ Chile Judicial Reform Project], <http://www.gtzreformajudicial.cl/> (last visited Jan. 17, 2008).

3. DEUTSCHE GESELLSCHAFT FÜR TECHNISCHE ZUSAMMENARBEIT [GERMAN AGENCY FOR TECHNICAL COOPERATION], GTZ, SCHLUSSBERICHT AN DAS BMZ: CHILE: JUSTIZREFORM [FINAL REPORT TO THE FEDERAL MINISTRY FOR COOPERATION AND DEVELOPMENT: CHILE: JUSTICE REFORM] 1 (Jan. 22, 2007) [hereinafter GTZ FINAL REPORT]. For an examination of public diffusion around Latin America, see Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007).

4. *Snubs and Opportunities*, ECONOMIST, Nov. 25, 2006, at 37; see also *End of an Affair?: Coolness and Misunderstanding in the Americas*, ECONOMIST, Nov. 9, 2002, at 62; cf. Richard Feinberg, Letter to the Editor, *Neglecting the Neighbors*, FOREIGN POL’Y, July–Aug. 6, 2003, at 6–7 (describing U.S. policy as “reasonably active in Latin America in the last decade,” with most of the engagement taking place “away from the media glare” and supported by “sporadic top-level engagements”).

5. See James Cooper, *The U.S. Should Look to the South, Not the East*, SAN DIEGO UNION-TRIBUNE, Dec. 14, 2005, at B7; cf. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 6 (2002) (noting that “the relative power of Europe has declined [and] law is now involved in a competition between Europe and the United States, with the United States gaining influence” and developing a positive social analysis of how law relates

* * *

Latin American countries, historically within the United States' sphere of influence since gaining their independence from Europe, have come, once again, under the influence of Europe. A case in point is the increasing role that German legal culture has played in influencing legal culture⁶ and promoting legal reform efforts in Chile. As Washington, D.C., has pursued other foreign policy objectives outside of the Western Hemisphere,⁷ the resulting vacuum has been filled by Germany—and, at times, by France, Spain, and other Member States of the European Union.

European investors have also aggressively pursued business development in Latin America.⁸ In 2005, the European Union announced that it was “the leading foreign investor in Latin America, the leading donor to the region, and the leading trading partner of many Latin American countries, particularly those countries in the

to the field of state power and its reproduction and transformation over time); *see generally* Marcus J. Kurtz, *The Dilemmas of Democracy in the Open Economy: Lessons from Latin America*, 56 *WORLD POL.* 262 (2004).

6. *See* Richard J. Wilson, *Three Law School Clinics in Chile, 1970–2000: Innovation, Resistance and Conformity in the Global South*, 8 *CLINICAL L. REV.* 515, 520–23 (2002) (examining Chilean legal culture); *see also* ENRIQUE BARROS ET AL., *LA CULTURA JURÍDICA CHILENA [CHILEAN LEGAL CULTURE]* (Agustín Squella ed., 1988); JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d ed. 1985); CARLOS PEÑA ET AL., *EVOLUCIÓN DE LA CULTURA JURÍDICA CHILENA [EVOLUTION OF THE CHILEAN LEGAL CULTURE]* (Agustín Squella ed., 1994).

7. *See* *Snubs and Opportunities*, *supra* note 4, at 37 (noting that “Latin Americans dislike George Bush because of the war in Iraq and what they perceive, fairly or not, to be his high-handed neglect of their region”); *see generally* ANDRES OPPENHEIMER, *SAVING THE AMERICAS: THE DANGEROUS DECLINE OF LATIN AMERICA AND WHAT THE U.S. MUST DO* (2007); MICHAEL REID, *FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA’S SOUL* (2007).

8. *See* Ludger Volmer, Minister of State (F.R.G.), Speech at the Centro Brasileiro de Relações Internacionais (CEBRI) in Rio de Janeiro (Mar. 21, 2001), *available at* <http://www.auswaertiges-amt.de/diplo/en/Infoservice/Presse/Rede/Archiv/2001/010321-BrazilandLatinamericaPDF.pdf>. In his speech, Volmer explained that “European investments have increased tenfold since the beginning of the nineties Even today Europe is the most important investor in the south of Latin America—even ahead of the [United States].” *Id.*; *see also* Raymond Collitt, *Repsol Pours Money into Latin America Oil and Gas*, *FIN. TIMES* (London), Aug. 4, 2000, at 26; Geoff Dyer, *Telefonica to Invest Dollars 3.8bn in Brazil*, *FIN. TIMES* (London), Nov. 27, 1998, at 32; Keith Johnson, *Spain Emerges as M&A Powerhouse*, *WALL ST. J.*, Sept. 26, 2006, at A6; Bob Storck, *Upgrade in Mexico; VW to Give Puebla Plant \$1 Billion Overhaul*, *AUTOMOTIVE NEWS EUR.*, Aug. 14, 2000, at 15 (discussing Volkswagen AG’s plan to refurbish the oldest of its Latin American assembly plants); Benita Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy, Speech before the EU-LAC Business Summit: The EU and Latin America: Reenergizing a Strategic Partnership, Making Business Work, (May 12, 2006), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/293&format=HTML&aged=1&language=EN&guiLanguage=en>.

MERCOSUR trade group.”⁹ The European Union has also constructed bilateral and multilateral assistance agreements and free trade pacts.¹⁰ With these developments comes increased European soft power.¹¹ When the European Union enlarged from fifteen to twenty-five Member States in 2004, its population grew to 729 million people. With more market power comes more influence:

The new United States of Europe—to use Winston Churchill’s phrase—has more people, more wealth, and more trade than the United States of America. The New Europe cannot match [U.S.] military strength (and doesn’t want to, for that matter). But it has more votes in every international organization than the United States, and it gives away far more money in development aid. The result is global economic and political clout that makes the European Union exactly what its leaders want it to be: a second superpower that can stand on equal footing with the United States.¹²

Much scholarship¹³ and media speculation¹⁴ have addressed the battle over which worldview—that of the United States or that of the E.U. Member States¹⁵—will come to dominate international business, foreign relations, the war on terror,¹⁶ and international

9. Press Release, European Union, Latin America: The Commission Renews Its Strategy, IP/05/1555 (Dec. 9, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/1555&format=HTML&aged=0&language=EN&guiLanguage=en>.

10. See Commission Proposal for a Council Decision Concerning the Conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement Between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, 1997 O.J. (C 350) 6 (EC); see also European Community-MERCOSUR: Interregional Framework Agreement on Cooperation, Dec. 15, 1995, 1996 BDIEL AD LEXIS 11; IV EU-LAC Summit, ¶ 2, May 12, 2006 (promising expanded and deepened cooperation between Europe and Latin America and the Caribbean, built on “mutual respect, equality, and solidarity”).

11. For an examination of soft power, see generally JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE* 8–12 (2002).

12. T.R. REID, *THE UNITED STATES OF EUROPE: THE NEW SUPERPOWER AND THE END OF AMERICAN SUPREMACY* 1 (2004) (exploring the ways in which the European Union is positioning itself to be a global counterweight and second superpower on equal footing with the United States).

13. See, e.g., ROBERT KAGAN, *OF PARADISE AND POWER* (2003) (discussing the contrasting approaches taken by the United States and Europe to foreign relations, with the United States continuing to exercise power while Europe moves away from power toward laws and rules).

14. Eugenio Tironi, *Nos han mentido [They have lied to us]*, EL MERCURIO, May 2, 2006, at A3 (“La guerra ideológica o propagandística entre el modelo americano y el modelo europeo no tiene nada que envidiarle a la Guerra Fría entre el capitalismo y el comunismo.”).

15. See DENNIS L. BARK, *AMERICANS AND EUROPEANS DANCING IN THE DARK: ON OUR DIFFERENCES AND AFFINITIES, OUR INTERESTS AND OUR HABITS OF LIFE* 1 (2007) (finding that “[o]ne of the few things that Europeans and Americans do agree on is that we are drifting apart”).

16. Mark Landler, *German Court Challenges C.I.A. Over Abduction*, N.Y. TIMES, Feb. 1, 2007, at A1; see also BARK, *supra* note 15, at 209 (noting that the beginning of the war in Iraq, in

rule-making.¹⁷ This struggle plays out in international bodies, dispute resolution fora,¹⁸ and developing countries as they adopt models from abroad.¹⁹ As part of this beauty contest among “developed” States, the countries’ respective legal cultures compete to influence “developing” States as well as other “developed” States.²⁰ European legal culture,²¹ like U.S. legal culture, influences the development of norms, rules, and institutions in other countries.²² The exporting of legal culture is part of the foreign policy and development assistance agendas of Europe and the United States, especially as the world becomes more interconnected economically, politically, and socially.²³ In particular, German legal culture, like German political power, has become an

March of 2003, was not the starting point for the debate between the United States and “Old Europe,” but rather had already “moved on to the level of concluding statements”).

17. ROCKWELL A. SCHNABEL & FRANCIS X. ROCCA, *THE NEXT SUPERPOWER?* xxi–xxii (2005) (announcing that the European Union has recently “reached a crossroads, where it must choose between liberalizing its economy or pursuing the dirigiste policies that have held back growth in some of its largest members, and between enhancing its historic alliance with the United States or attempting to play the role of a geopolitical ‘counterweight’ to America”).

18. DAVID PALMETER, *THE WTO AS A LEGAL SYSTEM: ESSAYS ON INTERNATIONAL TRADE LAW AND POLICY* 338 (2003) (noting the similarity between the WTO dispute resolution system and the U.S. federal administrative system); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication*, 9 J. TRANSNAT’L L. & POL’Y 1, 2 (1999).

19. According to Thomas Carothers, there has been

an explosion of rule-of-law assistance all over the developing world, Eastern Europe, and the former Soviet Union. Many other bilateral donors, as well as the World Bank and the regional development banks, have plunged into the field. At least in some countries, the new consensus on the importance of the rule-of-law aid produces congestion on the ground.

THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD* 165 (1999). This observed trend mirrors what occurred in economic assistance: “[T]o date almost all of the influential foreign consultants in Eastern Europe have been neo-classical economists. Their ethnocentric—largely U.S.—prescriptions are given lip service and only a few genuine attempts at implementation.” Paul H. Brietzke, *Designing the Legal Framework for Markets in Eastern Europe*, in *EUROPEAN LEGAL CULTURES* 485, 485 (Volkmar Gessner, Armin Hoeland & Csaba Varga eds., 1996).

20. See John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429 (2003) (discussing the politics of exporting the rule of law, different attempts by different countries, and strategies); see also Jon Mills, *Principles for Constitutions and Institutions in Promoting the Rule of Law*, 16 FLA. J. INT’L L. 115 (2004).

21. See Franz Wieacker, *Foundations of European Legal Culture*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 49 (observing that the European legal culture is not unitary, but rather is composed of a Continental European legal culture, an Anglo-American legal culture, and an Eastern and Central European legal culture).

22. See R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORG. 103 (2004).

23. See Robert Kagan & Lee Alexrad, *Adversarial Legalism: An International Perspective*, in *COMPARATIVE DISADVANTAGES? SOCIAL REGULATIONS AND THE GLOBAL ECONOMY* 146, 146–80 (Pietro Nivola ed., 1997).

engine of influence for a larger European legal culture,²⁴ business culture,²⁵ and social character.²⁶

This Article explores the competition that exists between U.S. and German legal cultures²⁷ and examines Chilean legal reform efforts since the late 1990s as a case study of this competition. A country's legal culture is comprised of the self-governing rules and operations of national and regional bar associations, the format of legal education, the structure of the legal and judicial profession, the role of the judiciary, jurisprudential style, and the reputation of the legal sector according to the general public.²⁸ The influence of predominant legal cultures on developing nations has been explored in a number of contexts,²⁹ while the importance

24. Commentators have also noted that

[i]f we ignore the legal-historical and cultural-historical similarities—which may be described as forming a “European legal culture” only at the expense of a high degree of abstraction and which in fact can only be recognized as a cultural unity when contrasted to other legal cultures—we can proceed on the assumption that in the European Union a *practically* common legal culture is also developing, but that this process is still far from having attained a solid level of common interpretive patterns and routines with respect to the law.

Volkmar Gessner, Armin Hoeland & Csaba Varga, *Introduction: National Legal Orders Without a European Legal Culture?*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 493, 493–94 (citation omitted) (emphasis in original).

25. See Kenneth Dyson, *Cultural Issues and the Single European Market: Barriers to Trade and Shifting Attitudes*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 387, 387–90 (noting the impact German legal culture had within the European Community, which was much stronger than the impact of either of the U.S. or Japanese models).

26. See, e.g., Robert Malzacher, *Industrie- und Handelskammern: Deutsch-Französische Achse erneuern* [Chambers of Commerce and Industry: Renew the German-French Axis] (2003), http://www.giessen-friedberg.ihk.de/Geschaeftsbereiche/International/Europa_News/2003/IHK_Deutsch-Franz-Achse_erneuern.jsp?reload_coolmenu (last visited Mar. 11, 2008). Germany has the largest population in the European Union and has the largest percentage of seats in the European Parliament. See *Ihre Abgeordneten: Land und Fraktion* [Your MEPs: By Country and Political Group], <http://www.europarl.europa.eu/members/expert/groupAndCountry.do?language=DE> (last visited Mar. 11, 2008).

27. For other comparisons in U.S. and European approaches to legal issues, see generally Christopher Slobogin, *An Empirically Based Comparison of American and European Regulatory Approaches to Police Investigation*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE: PSYCHOLOGICAL PERSPECTIVES ON CRIMINAL JUSTICE SYSTEMS* 27 (Peter J. Van Koppen & Steven D. Penrod eds., 2003).

28. Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in *ADAPTING LEGAL CULTURES* 71, 78 (David Nelken & Johannes Feest eds., 2001) (noting that “[l]egal culture may be seen as a discourse with its own internal dynamics and structure, also having complex relations with other cultural components of the environment (for example, relating to trust and distrusts as bases of economic organization)"); Lawrence M. Friedman & Rogelio Pérez-Perdomo, *Latin Legal Cultures in the Age of Globalization*, in *LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE* 1, 2 (Lawrence M. Friedman & Rogelio Pérez-Perdomo eds., 2003) (stating that legal culture refers to “the cluster of attitudes, ideas, expectations, and values that people hold with regard to their legal system, legal institutions, and legal rules”).

29. MIRIAM AZIZ, *THE IMPACT OF EUROPEAN RIGHTS ON NATIONAL LEGAL CULTURES* 30 (2004) (contending that “the ‘market mentality’ of the European Court of Justice is a notice-

of fostering an effective legal culture has been noted in clinical legal education³⁰ and in legal practice.³¹ While some legal cultures reflect national borders,³² others are religiously based and separate from the sovereign State and national bar associations.³³ Legal culture has played as significant a part in the national development of the United States³⁴ as it has in the histories of Chile and Germany.³⁵ This Article compares the manner in which U.S. and German legal cultures have been exported or transplanted to Chile.³⁶

able part of its rights jurisprudence"); MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION: COLONIAL LEGAL CULTURE AND THE EMPIRE* 7 (2004) (providing an examination of imported legal literature in colonial Rhode Island); *see generally* LEGAL CULTURE AND THE LEGAL PROFESSION (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

30. Andrea Seielstad, *Unwritten Laws and Customs, Local Legal Cultures, and Clinical Legal Education*, 6 CLINICAL L. REV. 127, 172 (1999).

31. Lynn M. LoPucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1509 (1996).

32. *See generally* ERHARD BLANKENBURG & FREEK BRUINSMA, *DUTCH LEGAL CULTURE* (2d ed. 1994) (providing a descriptive overview of the Dutch legal system); Peter J. Van Koppen & Steven D. Penrod, *Adversarial or Inquisitorial: Comparing Systems*, in *ADVERSARIAL VERSUS INQUISITORIAL JUSTICE*, *supra* note 27, at 1, 1–19 (identifying the differences in criminal procedures between the United States and the Netherlands). The authors specifically explain that "[e]ach national system is also a moving target that keeps on changing all the time, both in practice and law." Van Koppen & Penrod, *supra*, at 2; *see also* CHARLOTTE VILLERS, *THE SPANISH LEGAL TRADITION* (1999); Peter A. Joy et al., *Building Clinical Legal Education Programs in a Country Without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 453 (2006) (examining Japan's legal culture).

33. *See* Asifa Quraishi, *Interpreting the Qur'an and the Constitution: Similarities in the Uses of Text, Tradition, and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006) (exploring how the Koran can be used to interpret the U.S. Constitution).

34. *See* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991) (describing the successful expansion, over opposition, of new forms of intangible property in Great Britain and the United States); Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 684 (1979); *see also* ROBERT KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 239 (1998) (attributing American "legal culture" and perhaps even "the very rule of law itself in the United States . . . to our national past time").

35. *See generally* LEGAL CULTURE IN THE AGE OF GLOBALIZATION, *supra* note 28 (explaining how the legal systems of Argentina, Brazil, Chile, Colombia, Mexico, Puerto Rico, Venezuela, France, Italy, and Spain changed in the last quarter of the twentieth century and how these changes relate to the political and social histories in which they are embedded); *see also* Robert Kagan, *Comparing National Styles of Regulation in Japan and the U.S.*, 22 LAW & POL'Y 225 (2000) (exploring the relationship between U.S. and Japanese regulations); Robert Kagan, *Should Europe Worry about Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD. 165 (1997).

36. *See* Van Koppen & Penrod, *supra* note 32, at 2. Van Koppen and Pernod state,

Comparing criminal justice systems is like shooting rabbits on a fair: you always shoot too high or too low, you always hit another rabbit than the one you were aiming at Each national system is also a moving target that keeps on changing all the time, both in practice and in law. And, all these systems differ in so many respects, that a systems-wide comparison is foolhardy.

In the last few years, the globalization process, with its bent on legal harmonization, has fomented an even greater competition between legal cultures.³⁷ Europe and the United States have competed over whose rules will be adopted around the globe.³⁸ This is the phenomenon that Yves Dezalay and Bryant Garth call “the setting of the transnational rules of the game.”³⁹ The contest affects, among other areas, corporate compliance in the wake of the Sarbanes-Oxley Act,⁴⁰ science and rule-making concerning food safety, the development of product liability regimes,⁴¹ and decisions of the International Standards Organization.⁴²

Id.; see also David Nelken, *Towards a Sociology of Legal Adaptation*, in ADAPTING LEGAL CULTURES, *supra* note 28, at 7, 25 (noting that the primary reason “for resorting to the concept of legal culture is the way it reminds us that aspects of law normally come in ‘packages’ of one sort or another”).

37. Lawrence M. Friedman, *Sociology of Transnational Law*, 32 STAN. J. INT’L L. 65, 77 (1996) (asserting that the driving force behind convergence is the global economy, which also “stimulates jurists to draft model laws and to worry about harmonization”); see also GLOBALISATION AND RESISTANCE: LAW REFORM IN ASIA SINCE THE CRISIS (Christoph Antons & Wolfram Gessner eds., 2007).

38. For Professor William Twining,

[R]ules are not the only, nor even the main, phenomena that are transplanted; that the reception of ‘lawyers’ law’ and legal techniques is less problematic than matters that are closely related to local *mores* or political issues of the day; and that the main agents of reception of law as technology are the legal *honoraires*, Weber’s ironic term for the dominant legal elite.

WILLIAM TWINING, *GLOBALISATION & LEGAL THEORY* 144 (2000); see also William Twining, *Some Aspects of Reception*, SUDAN L.J. & REP. 229 (1957).

39. Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306, 307 (Yves Dezalay & Bryant G. Garth eds., 2002).

40. See William A. Niskanen, *Enron’s Last Victim: American Markets*, N.Y. TIMES, Jan. 3, 2007, at A23 (explaining that “Sarbanes-Oxley has seriously harmed American corporations and financial markets without increasing investor confidence”); see also Silvia Ascarelli, *Citing Sarbanes, Foreign Companies Flee U.S. Exchanges*, WALL ST. J., Sept. 20, 2004, at C1; James M. Cooper, *Seen and Not Seen: System Friction and the Battle Over Corporate Governance*, in TRENDS IN WORLD TRADE POLICY: ESSAYS IN HONOR OF SYLVIA OSTRY (Alan S. Alexandroff ed., 2007).

41. See Boris Kozolchyk, *Foreword: Symposium—Products Liability in Latin America*, 20 ARIZ. J. INT’L & COMP. L. vii (2003). Kozolchyk states,

Approximately two decades after the first product liability decisions were handed down by United States courts and the Restatement of the Law of Torts (Second) was published by the American Law Institute, Latin American commentators, especially in Argentina, Brazil, Chile and Uruguay, began to develop a Latin American law of product liability. Soon thereafter, Latin American courts started to hand down their first products liability decisions. These writings and decisions were not carbon copies of their United States counterparts. Given the affiliation of Latin American law with European civil law, Latin American doctrinal comments and court decisions bore the visible influence of French, German, and Italian writers.

Id.

42. Peter A. Gourevitch, *The Macropolitics of Microinstitutional Differences in the Analysis of Comparative Capitalism*, in NATIONAL DIVERSITY AND GLOBAL CAPITALISM 239, 241

This competition among legal cultures is important for four reasons. First, the champion will likely dictate the rules of international institutions. As international organizations⁴³ increasingly regulate the world, a country's preeminence in an area or the adoption of its particular rule affords that country, its lawyers, and its businesses a large advantage.⁴⁴ Second, the winner of the competition will dictate the rules of national legal systems, molding foreign legal systems to be more like its own.⁴⁵ International actors—both public and private—realize global economies of scale that confer strategic advantages when dealing with regulations more similar to those of their home countries.⁴⁶ Third, the champion will benefit by means of greater advantages for its own lawyers and corporations, through economies of scale and lower transaction costs.⁴⁷ Naturally, whoever makes the rules has an inherent advantage in facilitating business dealings.⁴⁸ Fourth, by training foreign lawyers, jurists,

(Suzanne Berger & Ronald Dore eds., 1996) ("The features that differentiate the internal firm and industry organization of German, Japanese, American, French, British, Italian, Swedish, Austrian, Korean, Taiwanese, and other market economies are institutionalized in the regulatory systems constructed in all nations by their political systems. The regulatory system sustains the micro-institutional patterns of the economy."); Walter Mattli & Tim Buthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, *WORLD POL.*, Oct. 2003, at 1.

43. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8 (2004) (asserting the importance of global institutions "to solve [a variety of] collective problems that can only be addressed on a global scale . . . and through a variety of means").

44. See generally Jenny Anderson, *U.S. Financial Sector is Losing Its Edge*, *Report Says*, *N.Y. TIMES*, Jan. 22, 2007, at C3.

45. See Katharina Pistor, *The Standardization of Law and Its Effects on Developing Economies*, 50 *AM. J. COMP. L.* 97 (2002); see also Joseph Kahn, *Chinese Official Warns Against Independence of Courts*, *N.Y. TIMES*, Feb. 3, 2007, at A5 (quoting Chinese officials saying that "[e]nemy forces" are seeking to use China's legal system to Westernize and divide the country, and the Communist Party must fend them off by maintaining its dominance over lawyers, judges and prosecutors").

46. See Dezalay & Garth, *supra* note 39, at 307 (comparing "[t]ransnational battles about the appropriate rules of the game [to] continuations of national battles about the governance of the state and economy").

47. *Id.* at 307–08 (noting that, while not all "U.S. actors try to export a U.S. style of the law," those who "have advanced or seek to advance in the field of state power in the United States quite often and naturally choose to invest in the law").

48. It is true of U.S. influence as well. See Paul W. Drake, *Introduction: The Political Economy of Foreign Advisors and Lenders in Latin America*, in *MONEY DOCTORS, FOREIGN DEBTS, AND ECONOMIC REFORMS IN LATIN AMERICA FROM THE 1890S TO THE PRESENT* xi, xix (Paul W. Drake ed., 1994). Drake states,

Ever since the 1890s, Washington has recognized that nearly all U.S. advisers hired overseas can further its economic and strategic interests. However indirectly, U.S. health experts can induce foreigners to purchase U.S. drugs and medical equipment, military trainers can inspire them to buy U.S. arms and doctrines, agronomists to prefer U.S. seeds and farm machinery, engineers to favor U.S. construction firms and automobiles, artists to consume U.S. entertainment, educators to assign U.S. textbooks, and intellectuals to imbibe U.S. ideas. No matter how scientific, professional

and law enforcement officers, the society that wins this contest will further strengthen practices and values that promote the legal culture⁴⁹ at home.⁵⁰

From the Ten Commandments, Rome's *ius gentium*,⁵¹ the Justinian Code, Papal Encyclicals, and the Napoleonic Code to, more recently, corporate governance and insider trading regulations, legal models have long been exported to new jurisdictions from those in which they were created.⁵² The legal transplantation process has helped developing countries emerge from dictatorships and economic chaos to build new institutions and transform themselves.⁵³

Part II of this Article first examines why developed countries have focused on the legal sector of other developing countries and how aid and technical assistance facilitate the migration of legal cultures.⁵⁴ Early reform work often focuses on the economy, paving the way for free mar-

and altruistic the agents, their presence has usually encouraged the adoption of the technologies, systems, products, and beliefs of the United States.

Id.

49. Examples are Siemens AG prison products or Lexis-Nexis legal publications. See generally Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493 (2007).

50. Rachel Sieder, Line Schjolden & Alan Angell, *Introduction*, in *THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA* 13 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005) (asserting the importance of internal training of lawyers, judges, and public prosecutors).

51. BARRY NICHOLAS, *AN INTRODUCTION TO ROMAN LAW* 54 (1962).

52. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 19 (2d ed. 1993) (describing "legal transplants" as "the moving of a rule or a system of law from one country to another, or from one people to another"); see also JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* 29 (1980) (arguing that "notions of transferring law and legal system are probably as old as international commerce, domination, and interpenetration generally"); Terence C. Halliday & Lucien Karpik, *Postscript: Lawyers, Political Liberalism and Globalization*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM* 350 (Terence C. Halliday & Lucien Karpik eds., 1997) (observing that "[t]ransnational movements of people, commerce, ideas, institutions, and laws are hardly new").

53. See Stephen Haber, *Introduction: Institutional Change, Economic Growth, and Economic History*, in *POLITICAL INSTITUTIONS AND ECONOMIC GROWTH IN LATIN AMERICA* 1 (Stephen Haber ed., 2000). Haber states,

There has been a revolution in the social sciences in recent years emanating from the study of institutions in the process of economic growth. Institutions in this context are understood as the laws, rules, and informal agreements within societies that both permit and bound economic or other types of social behavior. They are not the organizations that society are composed of (the banks, churches, factories, governments) but are the sets of rules that govern how those organizations work.

Id.

54. Sieder, Schjolden & Angell, *supra* note 50, at 4 (allowing that the processes "of judicialization of politics can be driven 'from above,' 'from below,' or even, at least in part, 'from abroad'").

kets and open competition.⁵⁵ Legal reform has often followed thereafter. Part II then explores the history of legal transplantation and the manner in which Chile in particular became such fertile ground for foreign legal cultures to grow and, in the process, became a laboratory for many legal reform efforts.

Part III examines the German influence on the legal system and reform efforts in Chile. Part IV of this Article explores the roles that the U.S. government and other U.S. actors have played in exporting U.S. legal culture to Chile. As the Article will demonstrate, German legal culture got quite a head start.⁵⁶ Part V of the Article then examines the different kinds of influences that have emanated respectively from the United States and Germany. Part V also seeks to understand the dynamics of the U.S.-European relationship in the context of efforts to strengthen the rule of law in Chile, where there is competition, yet also signs of some convergence. The conclusion looks at the ethics of legal transplantation and the dangers of judicial imperialism or donor rejection.

II. FROM ECONOMIC REFORM TO LEGAL REFORM

The legal transplantation process involves, by its very nature, the adoption of, adaptation⁵⁷ to, incorporation of, or reference to legal cultures from abroad.⁵⁸ Judges, along with other actors in the legal

55. See JOHN GILLESPIE, *TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A "RULE OF LAW" IN VIETNAM I* (2006) (noting that after "the collapse of the Soviet bloc in the early 1990s, global, social, economic, and political interconnections have proliferated, stimulating renewed interest by large trading nations and international agencies in global legal harmonisation").

56. CAROTHERS, *supra* note 19, at 8 (explaining that "[t]he recent surge of democracy assistance is by no means exclusively or even principally a U.S. story").

57. Nelken, *supra* note 36, at 22 (analyzing the different ways in which legal adaptation occurs, including imposition, planning, deliberate efforts, or through convergence or divergence).

58. See GILLESPIE, *supra* note 55, at 3. Gillespie notes,

Legal transplantation is generally understood as the transfer of laws and institutional structures across geopolitical or cultural borders. It can be imposed or voluntary, encompass entire legal systems or single legal principles and integrate similar or different cultures. Within host countries, legal transfers may permeate state and non-state social institutions, or in the case of many developing countries, reside in state law superimposed on indigenous legal structures. It is increasingly linked to international legal harmonisation projects sponsored by large trading nations and international donor agencies.

Id.; cf. Cotterrell, *supra* note 28, at 79 (offering the opposing view that perhaps there is no logic of legal transplants, "the concept of legal transplant itself is unclear, the matters to be

sector—including prosecutors, justice ministry officials, judicial councils, supreme courts, law school professors, ombudspeople, and public defenders—often look to rules, institutions, and jurisprudence from other countries, particularly to those from similar legal traditions and Anglo-Saxon or other legal cultures.⁵⁹ Professor Alan Watson contends that “legal transplants [are] the moving of a rule or a system of law from one country to another, or from one people or another since the earliest recorded history.”⁶⁰ For many centuries, the legal codes and legal cultures that were established in Latin America were products of the colonial experience with Spain and Portugal.⁶¹ Prior to independence, laws were merely imposed on the territories of the colonial powers. Spain, through the legal culture it transplanted during colonial times, enjoyed a consistent influence on the New World in the Americas.⁶² In the colonies, “the Spanish judiciary was given almost no autonomy and continued to depend on the Crown’s scholarly-inspired statutes with limited reflection of the principles, customs and values arising from Spain’s diverse regions.”⁶³

After independence in the early part of the nineteenth century, however, legal models from other countries like the United Kingdom and the United States soon found receptive homes in the southern parts of the Western Hemisphere.⁶⁴ Statutes, customs, and legal processes were

addressed are too complex, the variables are too numerous, or they remain too often insufficiently defined”).

59. See, e.g., *Knight v. Florida*, 528 U.S. 990 (1999) (Kennedy, J.); see also *Roper v. Simmons*, 543 U.S. 551 (2005).

60. WATSON, *supra* note 52, at 19; see also GARDNER, *supra* note 52, at 29 (declaring that “notions of transferring law and legal systems are probably as old as international commerce, domination and interpenetration generally”). But see Pierre Legrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES, *supra* note 28, at 55, 63 (asserting a belief that the idea of “legal transplants” is a fiction because “what can be displaced from one jurisdiction to another is, literally, a meaningless form of words”).

61. GARDNER, *supra* note 52, at 30 (finding that the “legal export experience of the European colonialists is particularly relevant and instructive”).

62. See ELENA MERINO-BLANCO, *THE SPANISH LEGAL SYSTEM* 15–20 (1996) (describing how the influence of the Spanish philosophical movement in colonial times led to the Spanish legal system’s theoretical basis for subsequent centuries); Javier A. Couso, *The Changing Role of Law and Courts in Latin America: From an Obstacle to Social Change to a Tool of Social Equity*, in COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES 62 (Robert Gargarella, Pilar Domingo & Theunis Roux eds., 2006) (discussing historical legal norms from the colonial era in Continental Europe, during which time the courts were simply “another expression of royal power,” which reached even into the remote colonies).

63. Felipe Sáez García, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT’L L. REV. 1267, 1282 (1998).

64. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 167 (2003); see also M.C. MIROW, *LATIN AMERICAN LAW* 130 (2004). Mirow notes,

transplanted in a wholesale fashion, themselves the product of French influence over the codification process.⁶⁵

For much of the twentieth century—at least until the early 1980s—most governments in Latin America pursued policies of economic nationalism, including import substitution and controls on capital flows. Latin American governments closed markets to foreign competition and pursued state intervention.⁶⁶ When these policies failed, they resulted in economic stagnation, hyperinflation, and the erosion of living standards.⁶⁷ International bond defaults in the early 1980s produced military dictatorships and oppressive regimes simultaneously throughout Latin

The use of European code provisions, European organizational structures for law, and European doctrine had a powerful impact on Latin American law and legal development. Law students and lawyers tended toward an international intellectual outlook that included training in European languages, French most of all, and readily made these foreign sources their own. Furthermore, since European law provided a great deal of intellectual framework and content of Latin American law, further adoption and appropriation of European models and indeed European improvements were relatively common.

Id.

65. EDGARDO BUSCAGLIA, JR., MARIA DAKOLIAS & WILLIAM RATLIFF, *JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT* 17–18 (1995). They state,

Most of the civil law countries in Latin America achieved their independence in the nineteenth century and one after the other they adopted civil codes that in many cases were little more than translations of the French code. Many of these transplants occurred when countries in Latin America were providing raw materials for the second Industrial Revolution taking place in North America and Europe. The infrastructure and financial capital were provided by London and Paris, two of the main financial centers at that time. Consequently, the legal systems throughout Latin America needed to respond to the interests of the suppliers of capital and the local producers.

Id.

66. See ALVARO VARGAS LLOSA, *LIBERTY FOR LATIN AMERICA* 46 (2005).

67. See Alan M. Taylor, *Latin America and Foreign Capital in the Twentieth Century: Economics, Politics, and Institutional Change*, in *POLITICAL INSTITUTIONS AND ECONOMIC GROWTH IN LATIN AMERICA*, *supra* note 53, at 121, 124–25. Taylor notes,

In 1900, the Latin American income level was well above that in Asia and stood at 41 percent of the OECD core. In 1950, Latin American gross domestic product (GDP) per capita was 45 percent of the OECD core level and more than three times the Asian average. But by the 1980s Latin America had fallen back to less than one-third the OECD level and was being approached and overtaken by parts of Asia. This twentieth-century relative retardation and slump in living standards is Latin America's burden of history and remains a central, burning issue in the region's political, social, and economic landscape.

Id.

America. The region was ready for a change.⁶⁸ In exchange for the adoption of certain rules and regulations concerning the functioning of markets, and some strengthening of democratic institutions, the international financial community lent money to these nascent democracies in an attempt to encourage a set of “neoliberal” policies—the so-called Washington Consensus.⁶⁹ Privatization of state assets was a central part of the prescription.⁷⁰ Deregulation, the opening of markets to foreign competition, and the lowering of barriers to trade were also recommended policies.⁷¹

These policies—involving the flow of capital, intellectual property, technology, professional services, and ideas—require that disputes be settled fairly and by a set of recognized and enforced laws.⁷² The rule of law, after all, provides the infrastructure upon which democracies may thrive, because it functions to enforce property rights and contracts.⁷³

68. MERILEE S. GRINDLE, *AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA* 8 (2000) (explaining that “[i]n the decade and a half following the economic crisis of the early 1980s, Latin American countries were a laboratory of economic policy change and political transition”).

69. See John Williamson, *From Reform Agenda: A Short History of the Washington Consensus and Suggestions for What To Do Next*, FIN. & DEV., Sept. 2003, at 10. The Washington Consensus is the expression that came to explain the process of deregulation, privatization, lowering of tariff and other trade barriers, and promotion of neo-liberal and free market economics. The protectionist policies of past decades, like import substitution and state-led national industrialization, were to be reversed and replaced by policies that opened markets to international competitors, who would in turn promote economic growth investment, production, and efficiency. See Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L.J. 691 (2006).

70. See Alberto Chong & Florencio Lopez-de-Silanes, *The Truth About Privatization in Latin America*, in *PRIVATIZATION IN LATIN AMERICA: MYTHS AND REALITIES* 1, 1 (Alberto Chong & Florencio Lopez-de-Silanes eds., 2005) (noting that “[p]rivatization efforts have greatly stalled in recent years, however, despite worldwide evidence that points to improved performance, firm restructuring, fiscal benefits, increased output, and quality improvements following privatization”).

71. Douglass C. North & Barry R. Weingast, *Concluding Remarks: The Emerging New Economic History of Latin America*, in *POLITICAL INSTITUTIONS AND ECONOMIC GROWTH IN LATIN AMERICA*, *supra* note 53, at 273, 282–83 (finding that although “[e]conomists have a well-developed theory about the form of these rules to produce economic development,” the “political decisions in Latin America . . . frequently bias the rules away from those that produce efficient markets”).

72. See GRINDLE, *supra* note 68, at 10 (citing DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990)) (explaining that “institutions such as property rights and contracts, and such regimes as legal system and government policies, are understood to evolve over time to lower transaction costs, offset problems of incomplete information, and encourage greater efficiency in the functioning of markets”).

73. See Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809 (2005).

Likewise, the rule of law is the foundation for economic growth and prosperity:⁷⁴

Law is a key element of both a true and a stable democracy and of efficient economic interaction and development both domestically and internationally The quality and availability of court services affect private investment decision and economic behavior at large, from domestic partnerships to foreign investment.⁷⁵

Foreign businesses that invest or do business abroad want to ensure that their intellectual property, shareholder, capital repatriation, contract, and real property rights will be protected.⁷⁶ It is not surprising, then, that in

74. O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 AM. BUS. L.J. 441, 447 (2001) (quoting Kofi Annan's address to the U.S. Chamber of Commerce and arguing that all business professors and students must study and understand that the rule of law and property law are the starting points for grasping how a private market functions, because law may be defined as "the formal social ordering force of modern society," which is "fundamental for business practice under conditions of heterogeneity found in the modern nation-State"); see also Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 790-91 (2001). Black states,

An honest judiciary is a must for investor remedies to be meaningful, but is often partly or wholly absent in developing countries. Decent judicial salaries are needed if judges are to stay honest. Good training helps—professionalism can be a bulwark against corruption. Honest prosecutors are an essential support for honest courts, lest a powerful defendant combine a bribe if a judge is compliant with a personal threat if she is not.

Id.

75. BUSCAGLIA, DAKOLIAS & RATLIFF, *supra* note 65, at 9; see also Daniel Kaufman, Aart Kraay & Pablo Zoido-Lobaton, *Governance Matters* (World Bank, Policy Research Working Paper No. 2196, 1999) (reporting that broad measures of effective government and of "rule of law"—predictability of court decisions and enforceability of contracts—correlate positively with per capita GDP, while corruption correlates inversely with GDP); Thomas Ulen, *A Quantitative Assessment of the Efficiency of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 275 (1997) (stating that the results of business surveys throughout Latin America indicate that the judicial system is seen as a constraint to reasonable accessibility for those in the private sector).

76. See Carol Graham & Moises Naim, *The Political Economy of Institutional Reform in Latin America*, in BEYOND TRADE-OFFS: MARKET REFORM AND EQUITABLE GROWTH IN LATIN AMERICA 322 (Nancy Birdsall, Carol Graham & Richard H. Sabst eds., Inter-Am. Dev. Bank 1998). They state,

Macroeconomic reforms are diverse, yet all of them have three characteristics in common: reform decisions center on changing the rules guiding macroeconomic behavior; reforms are adopted by the executive branch in relative isolation from the rest of the political system; and new policies imply the dismantling of many existing agencies, rather than the building of new institutions. Institutional reforms are quite different, and entail changing organizations needed to support the new economic policies (such as regulatory and export promotion agencies, and social safety nets), as well as the upgrading of existing public agencies devastated by decades of neglect, under investment, and capture by special interests.

Id.

the aftermath of the economic reforms, or at times concurrently, there also have been efforts to implement new criminal procedures, protect human and civil rights, and increase access to justice.⁷⁷ Economic growth and sustainable development require a functioning, transparent, and efficient judicial sector.⁷⁸ “[I]t is not enough to build highways and factories to modernize a State . . . a reliable justice system—the very basis of civilization—is needed as well.”⁷⁹ Without the rule of law, corruption in the tendering regimes was rampant, encouraging the looting of national treasuries,⁸⁰ the exploitation of labor, and the polluting of the environment.⁸¹ As Professor Joseph Stiglitz sadly points out, “The market

77. Cf. Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in *THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA* 255, 268 (Juan E. Méndez, Guillermo O'Donnell & Paulo Sérgio Pinheiro eds., 1999) (proposing that “[a] preliminary and not very optimistic conclusion would be that judicial reforms in Latin America are definitively linked more with the opening of markets than with any other factor”).

78. For the U.S. Agency for International Development (USAID), “[a]n independent, efficient, and transparent judiciary is not only fundamental for a functioning democracy but also a prerequisite for increased external investment.” U.S. AGENCY FOR INT’L DEV. [USAID], USAID CONGRESSIONAL BUDGET JUSTIFICATION 2004: LATIN AMERICA AND CARIBBEAN (2004), available at http://www.usaid.gov/policy/budget/cbj2004/latin_america_caribbean/. The World Bank has also agreed that “good macro policy is not enough; good institutions are critical for macroeconomic stability in today’s world of global financial integration.” WORLD BANK, BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER 3 (1998) (emphasis in original); Graham & Naim, *supra* note 76, at 321 (explaining how, although “Latin America’s macroeconomic turnaround of the 1990s . . . has been widely successful,” the focus changed by the mid-1990s, and the goal that “dominated the attention of policymakers, multilateral institutions and researchers [became] ‘institution building’”); see generally Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 17, 24–28 (Pilar Domingo & Rachel Sieder eds., 2002).

79. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT’L L. 167 (1995) (citing *Friday Dialogue*, PRESENCIA (La Paz), July 22, 1994, at 2, translated in *Justice Minister Discusses Need for Reform*, F.B.I.S. DAILY REP.: LATIN AM., Aug. 29, 1994, at 49, 51 (interviewing Bolivian Minister of Justice Rene Blattman)); Pilar Domingo, *Judicialization of Politics or Politicization of the Judiciary? Recent Trends in Latin America*, in *DEMOCRATIZATION* 104, 105 (2004) (asserting that “promoting rule of law has become widely accepted throughout the region as a necessary aspiration for the consolidation of democracy, and is very much part of the remit of state reform and quest for ‘good governance’”).

80. See Pilar Domingo, *Judicial Independence and Judicial Reform in Latin America*, in *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* 151, 151 (Andreas Schelder, Larry Diamond & Marc F. Plattner eds., 1999) (finding that “[o]ne of the major challenges for the new democracies is to establish credible mechanisms of accountability,” where accountability is defined as a system wherein officials are responsible for their actions within a “pre-established legal and constitutional framework that sets the limits and powers of state agencies and government organs”).

81. See Sutil, *supra* note 77, at 265 (examining the breadth of judicial responsibility, including economic issues “related to the right to limit or ban some industrial projects in order to protect the economy”); see also Sieder, Schjolden & Angell, *supra* note 50, at 1 (enumerating the reasons people resort to the courts to assert their rights, including “the weakness of

system requires clearly established property rights and the courts to enforce them; but often these are absent in developing countries.”⁸²

A healthy and independent judicial power is also one third of a healthy democratic government.⁸³ Along with the executive and legislative branches, the judicial branch helps form the checks and balances to allow for an effective system of governance. Instead, what has resulted over the last few decades in many Latin American governments is a breakdown in the rule of law: a judiciary unable to change itself, virtual impunity from prosecution, judicial officers gunned down, and the wholesale interference with the independence of the judicial power. The judiciary is not as independent as the other two branches of government.⁸⁴ Instead, the judiciary functions as part of the civil service: devoid of law-making abilities, merely a slot machine for justice that applies the various codes.⁸⁵

Since emerging from decades of dictatorship, many Latin American countries have focused, in varying degrees, on reforming their respective legal systems.⁸⁶ Governments have introduced alternative

effective citizenship rights, the insecurities and hardships produced by economic crisis, and the failure of neoliberal policies to alleviate poverty”).

82. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 74 (2002) (stating also that “[t]here is no question that flaws in the financial system (and overhang of nonperforming loans) must be addressed before rapid sustainable growth can be resumed”); see also Anne O. Krueger, *Why Crony Capitalism is Bad for Economic Growth*, in *CRONY CAPITALISM AND ECONOMIC GROWTH IN LATIN AMERICA* 22 (Stephen Haber ed., 2002).

83. Sieder, Schjolden & Angell, *supra* note 50, at 1 (explaining that constitutional review became more important in the 1990s, and how “in many countries constitutional courts and supreme courts are now more active in counterbalancing executive and congressional power than at any previous time”).

84. See WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* (2000). Prillaman observes,

Perhaps the most noted phenomenon in Latin American judiciaries has been the inability to achieve the delicate balance between judicial independence and judicial accountability, particularly because of the various measures that politicians have used to reduce institutional independence: limiting tenure, packing courts, purging court personnel, and creating special tribunals under the executive branch that bypass or replace the formal judicial hierarchy.

Id. at 19.

85. García, *supra* note 63, at 1285 (noting that “the core bureaucratic culture of the judiciary—expressed mainly in highly formal judicial processes, a judicial philosophy devoid of historical and substantive policy considerations, and a rigid organization unyielding to changing social demands and conditions—remains virtually unaltered” and identifying and describing the major historic, institutional, and organizational constraints governing the judiciaries’ structure and operations in the region).

86. See generally Joseph R. Thome, *Heading South But Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691 (exploring overall trends in Latin America, particularly economic and social concerns). There has been a long history of scholarship in Latin America concerning reform of the criminal law and its procedure. See

dispute resolution mechanisms,⁸⁷ updated judicial case management systems,⁸⁸ codified laws,⁸⁹ partially altered the legal education system,⁹⁰ and encouraged *pro bono* activities through legal clinic opportunities for law students.⁹¹ A variety of methods and projects have been applied to modernizing the judicial sector, with limited results on a region-wide basis.⁹² Like other areas for reform, there have been attempts at transforming criminal procedure.⁹³ Criminal law has been a source of

EUGENIO RAÚL ZAFFARONI, *ORIGEN Y EVOLUCIÓN DEL DISCURSO CRÍTICO EN EL DERECHO PENAL* [ORIGIN AND EVOLUTION OF CRITICAL DISCOURSE IN CRIMINAL LAW] (2004).

87. Dakolias, *supra* note 79, at 168–69 (asserting that “the transition from family-run businesses, which did not rely on laws and formal mechanisms to resolve conflicts, to transactions with unknown actors has created a need for formal conflict resolution”); *see also* Thomas J. Moyer & Emily Stewart Haynes, *Mediation as a Catalyst for Judicial Reform in Latin America*, 18 OHIO ST. J. DISP. RESOL. 619 (2003); *see generally* Cynthia Alkon, *The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs*, 2002 J. DISP. RESOL. 327 (2002) (discussing attempts to bring legal reform, specifically alternative dispute resolution, to emerging democracies).

88. LINN HAMMERGREN, *ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA* 12 (2007) (finding that USAID “was especially important [in the field of judicial administration], because the U.S. courts were the most advanced in court administration, and the United States at the time still dominated the field in donor assistance”).

89. *See generally* GARDNER, *supra* note 52, at 14 (noting the absence of the U.S. legal education model in Latin America and elsewhere); Alfredo Fuentes-Hernández, *Globalization and Legal Education in Latin America: Issues for Law and Development in the 21st Century*, 21 PENN ST. INT’L L. REV. 39 (2002); *cf.* Friedman, *supra* note 37, at 74 (finding it difficult, for good reason, to learn about a “living legal system” simply by an “examination [of] the curriculum of a law school or by reading legal periodicals”).

90. Friedman, *supra* note 37, at 74.

91. DEZALAY & GARTH, *supra* note 5, at 246 (noting, however, that “it is conceded by all that the efforts have not come close to achieving the stated purposes of transforming legal education and legal scholarship or building the independence and stature of the courts”).

92. *See generally* BUSCAGLIA, DAKOLIAS & RATLIFF, *supra* note 65; LA JUSTICIA MÁS ALLÁ DE NUESTRAS FRONTERAS: EXPERIENCIAS DE REFORMA ÚTILES PARA AMÉRICA LATINA Y EL CARIBE [JUSTICE BEYOND OUR BORDERS: EXPERIENCES OF REFORM USEFUL FOR LATIN AMERICA AND THE CARIBBEAN] (Christine Bieberhseimer & Carlos Cordovez eds., 1999). Another commentator notes,

The judiciary in the Latin American region is facing a mounting challenge in terms of its creditability, its functional effectiveness, its standing vis-à-vis the other powers of the state, its contribution as a bulwark for the protection of human rights in societies with vulnerable democratic institutions, its role in promoting a predictable institutional environment in the economic sphere, and its obligation to provide a forum for the fair and effective resolution of disputes. This challenge has been mounting for decades, resulting from claims of various constituencies who have not seen their demands for justice met.

García, *supra* note 63, at 1268.

93. BUSCAGLIA, DAKOLIAS & RATLIFF, *supra* note 65, at 21 (noting that these reforms, because they might seem threatening to those in power, should be implemented slowly).

legal transplantation throughout history.⁹⁴ It is not surprising, then, that this is a focus of post-dictatorship administrations.⁹⁵ The criminal law and the closed, secret trial procedures that are part of the inquisitorial system⁹⁶ became a metaphor for the dictatorships.⁹⁷

A final point which emphasizes the relevance of the criminal justice system to the consolidation of democratic institutions relates to the need to replace a slow and arcane criminal process with a relatively speedy and open system of administration of justice. The establishment of open, oral, and concentrated trials, to be held with relative speed after the commission of a crime, is

94. JOHN MERRYMAN, DAVID CLARK & LAWRENCE FRIEDMAN, *LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY* 421 (1979).

95. HAMMERGREN, *supra* note 88, at 9 (explaining how the first round of Latin American reforms in the early 1980s “focused largely on criminal justice from the standpoint of containing human rights abuses and ending the impunity of abusers”).

96. The inquisitorial model of criminal procedure is derived from the traditions of investigation brought over by the colonizing nations. MERRYMAN, *supra* note 6, at 127. A truth-telling exercise, based on Papal Encyclicals and Canonist Law, the inquisitorial criminal process is conducted by an investigating judge who discovers the truth concerning a crime and then sentences the defendant. That is,

[E]vidence is gathered by judges or judge-like investigators, public officers who operate under a duty to seek the truth. Criminal investigation is understood to be a public rather than a private function. At trial, the presiding judge examines the witnesses. The lawyers for the prosecution and defense play subordinate roles, mostly recommending lines of inquiry, sometimes supplementing the court’s questioning of witnesses.

JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 1 (2003).

In the inquisitorial model, there are no oral hearings, nor are there opportunities for the accused to confront his or her accusers or the chance to rebut testimony and impeach the credibility of witnesses. Instead, the process is slow, held in secret, and involves a court functionary taking depositions. This civil servant, who is neither a judge nor a law school graduate, then reduces the testimony to writing for the investigating judge to read later. The defendant is an object of investigation, rather than a subject with human and civil rights. The inquisitorial system does not facilitate due process, transparency, or participation. It is no surprise that the inquisitorial system also permits, on occasion, torture and other violations of human rights. See MERRYMAN, *supra* note 6, at 127–28 (explaining also that, “[i]n the civil law world, movement toward the extremes of the inquisitorial model was impelled by the revival of Roman law, the influence of canonic procedure, and, most important, the rise of statism”).

97. BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* 347 (1993) (stating that the “*código penal* provided government officials and police with the authority to combat unruly crowds, political protests, and, later, union organization and strikes without recourse to regimes of exception,” and, likewise, in pre-revolutionary France, there was much abuse of the criminal law by the *ancien regime*); MERRYMAN, *supra* note 6, at 128 (explaining also how public sentiment in the eighteenth century forced a reform of criminal procedure during the European revolutions).

crucial to providing transparency to the administration of justice.⁹⁸

This move from the inquisitorial to the adversarial system of criminal procedure is often part of the return to democracy in many countries once the military has returned to the barracks.⁹⁹ Criminal procedure is fundamental to human rights, as it was often utilized by military regimes as a tool of repression.¹⁰⁰ In adversarial systems, however, there is participation in court proceedings, and victims may confront the accused. Defendants now have the opportunity to hear the evidence being used against them. Families may participate and be present during the examination and cross-examination.

Despite the implementation of some of these more transparent court procedures, judicial reforms in many parts of Latin America have not met with great success,¹⁰¹ leading one analyst to conclude: "In Latin America, there is no justice system. There is an authoritarian political system and the courts are its instruments."¹⁰² Chile, however, has been an exception to this rule.¹⁰³ Legal reform efforts in Chile have succeeded for a number of reasons.

98. Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT'L L. 1, 37 (1993).

99. See Domingo, *supra* note 80, at 151.

100. Garro, *supra* note 98, at 37 (asserting that the "establishment of open, oral and concentrated trials, to be held with relative speed after the commission of a crime, is crucial to providing transparency to the administration of justice"); see also HAMMERGREN, *supra* note 88, at 10 (noting that these "reforms received financial backing and additional impetus from foreign donors, especially the United States. The latter added an interest in prosecuting state agents who had perpetuated abuses").

101. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (analyzing legal development writing about Latin America and critiquing the "failed law" discourse).

102. VARGAS LLOSA, *supra* note 66, at 213. For a more balanced, if a little precipitous, conclusion, see generally LA JUSTICIA MÁS ALLÁ DE NUESTRAS FRONTERAS, *supra* note 92; see also HAMMERGREN, *supra* note 88, at 2 (finding, unfortunately, that the majority believes that "most reforms are still on the wrong track and thus, if they get anywhere, will likely arrive at the wrong destination").

103. ANTHONY W. PEREIRA, *POLITICAL (IN)JUSTICE: AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA* 94 (2005) (comparing Chile to the rest of Latin America and finding it "a particularly rule-bound and orderly society"); see also *Fujimori's Trials*, *ECONOMIST*, Jan. 7, 2006, at 20 (agreeing with the assessment that "Chile prides itself on applying the rule of law more rigorously than its neighbours").

A. Why Chile

The Chileans love laws, the more complicated the better. Nothing fascinates us as much as red tape and multiple forms.

—Isabel Allende¹⁰⁴

Chileans are often celebrated as the best adapters and adopters of legal reforms because they have strong institutions to support democratic governance and the rule of law.¹⁰⁵ Chile has had a history of legal transplantation since it first declared independence in 1810.¹⁰⁶ Chile derived its laws and legal culture in part from Roman legal culture. During the pre-independence Colonial Period and the post-independence National Period, the laws that were transplanted came from Spanish colonial rule, and reflected the legal cultures of France, Italy, Spain, and even Great Britain.¹⁰⁷

Since the Latin American Colonial Period and the National Period, Europe and the United States have each played varying roles in assisting the legal development of the new countries in Latin America, including Chile. The region has long been a testing ground for judicial reform, the creation of markets, and economic integration.¹⁰⁸ Dezalay and Garth note:

Chile was a laboratory in which contenders for legitimate state expertise in the north invested heavily, whether through

104. ISABEL ALLENDE, MY INVENTED COUNTRY 91–92 (Margaret Sayers Peden trans., HarperCollins 2003) (2003).

105. See Harry Barnes, *Lessons of the Chilean Transition to Democracy*, in THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF LATIN AMERICA 155 (Kenneth W. Thompson ed., 1991); Rafael X. Zahraiddin-Aravena, *Chile and Singapore: The Individual and the Collective: A Comparison*, 12 EMORY INT'L L. REV. 739, 808 (1998).

106. See generally MIROW, *supra* note 64, at xiii (describing the general trajectory of post-independence, Spanish-speaking, Latin American legal systems). Mirow further notes that

[i]n the independence period, private law responded to new republican values and nationalism through substantive changes in rules and through codification based on European models. For the twentieth century, private law responded to the increasing demands of national commerce and social advances. An important shift noted during this work is a decrease in the importance of imported private law from Europe as a source and an increase in domestic developments, although still often informed by North American and international private law.

Id.

107. See *id.* at 168–69; see also LOVEMAN, *supra* note 97, at 4 (explaining that the “liberal principles of France, Britain and the United States failed as replacements” when the “divinely inspired law of the Spanish kings” was overthrown due to the early nineteenth century independence movements).

108. See Kurtz, *supra* note 5.

democratic socialism or liberal economics. What happened in Chile, therefore, played directly into northern debates fought in the media, universities and think tanks.¹⁰⁹

For more than three decades, the Andean country was a model for privatization and policies—the precursor to the Washington Consensus.¹¹⁰ In the aftermath of the military coup of September 11, 1973, which overthrew the government of President Salvador Allende,¹¹¹ a group of free market economists educated at the University of Chicago returned to Chile to take over government ministries.¹¹² During the military dictatorship of General Augusto Pinochet, Chile's own "Chicago Boys" played a key role in the transition toward neo-liberal economics.¹¹³

109. DEZALAY & GARTH, *supra* note 5, at 141 (developing a positive social analysis of how law relates to the field of state power and its reproduction and transformation over time).

110. See Barnes, *supra* note 105, at 158–59 (noting how Chile's "rapid economic recovery of the 1980s became a model for how a developing country with a heavy debt burden . . . puts its house in order"); Guillermo Perry & Danny M. Leipziger, *Introduction*, in CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES 3 (Guillermo Perry & Danny M. Leipziger eds., 1999); Wilson, *supra* note 6, at 519 (reporting the consensus that Chile is "considered by many to be among the most successful market economies of the South"). Perry and Leipziger state,

The "Chilean model" has been expostulated for some time in the region and elsewhere because it appeared that the country, despite terrible political and economic turmoil, embodied important lessons about economic management. Arenas often cited include banking crisis management, pension policy innovation, new export market development privatization, and targeted social policies. More broadly, the dominance of market solutions in the country, its public policy discipline, and social policy advancements have promoted the Chilean case to the forefront of replicable lessons.

Perry & Leipziger, *supra*, at 3.

111. See generally CHILE: THE BALANCED VIEW: A RECOMPILATION OF ARTICLES ABOUT THE ALLENDE YEARS AND AFTER (Francisco Orrego Vicuña ed., 1975) (providing a compilation of articles about the Allende years from a contemporary perspective).

112. See generally Ronald Fischer, Rodrigo Gutierrez & Pablo Serra, *The Effects of Privatization on Firms: The Chilean Case*, in PRIVATIZATION IN LATIN AMERICA: MYTHS AND REALITIES, *supra* note 70, at 197, 198 (reporting the opinion of many analysts that "the strong growth of the Chilean economy that began in 1985 (after a severe crisis in the first half of the decade) [can be ascribed] to economic liberalization").

113. Patricio Silva, *Technocrats and Politics in Chile: From the Chicago Boys to the CIEPLAN Monks*, in MONEY DOCTORS, *supra* note 48, at 205, 213 (explaining the Chicago Boys' "seven modernizations" and their plan to "establish the rules of neoliberalism in all spheres of society"); see also VARGAS LLOSA, *supra* note 66, at 151. Vargas Llosa states,

Privatization started in 1974 when the government returned entities that had been expropriated: industrial commercial companies first, then financial institutions. It continued with the sale of enterprises that had been in state hands since the 1960s. The recession of the early 1980s put a hold on this policy, but privatization resumed in 1984, with industrial commodities, and primary products corporations sold to private interests.

Chile was a pilot site for a litany of reforms, including the privatization of social security¹¹⁴ and pensions.¹¹⁵ Economic growth resulted,¹¹⁶ and Chile continues to earn a favorable trade balance, and, with the exception of 1993, to “run[] up an impressive cumulative surplus.”¹¹⁷ The Chileans have cherry-picked the best aspects of a variety of models in the private law field (most of which emanated from the United States¹¹⁸), laying the foundations for a market economy.¹¹⁹

Although Chile has historically been a willing recipient of free market economic models,¹²⁰ legal reforms were interrupted during the

114. See José Piñera, Op-Ed., *Retiring in Chile*, N.Y. TIMES, Dec. 1, 2004, at A31.

115. Fischer, Gutierrez & Serra, *supra* note 112, at 197 (characterizing the Chilean privatization process as “all-encompassing”); see generally Angelo Codevilla, *Is Pinochet the Model?*, FOREIGN AFF., Nov./Dec. 1993, at 127.

116. In an issue devoted to the unique situation in Latin America, the journal *Latin American Economic Policies* found that, “[b]etween 1992 and 1996, Chilean GDP per capita expanded more than 30 percent in real terms. During the same period, moderate poverty registered a substantial decline from 20 to 16 percent But income inequality also increased during this period.” Research Dep’t, Inter-Am. Dev. Bank, 14 LATIN AM. ECON. POLICIES 1 (2001); see generally MARTIN MULLINS, IN THE SHADOW OF THE GENERALS: FOREIGN POLICY MAKING IN ARGENTINA, BRAZIL AND CHILE 102 (2006); Couso, *supra* note 62, at 73 (crediting the “neo-classical economic model inherited by the democratic government” with “dramatically reduc[ing]” poverty in Chile, but admitting that the number of people still living in poverty remains “unacceptably high”); Alejandro Foxley T. & Claudio Sapelli, *Chile’s Political Economy in the 1990s: Some Governance Issues*, in CHILE: RECENT POLICY LESSONS AND EMERGING CHALLENGES, *supra* note 110, at 393, 421 (questioning the “replicability” of the Chilean experience in light of Chile’s unique, “historical development and context, the weight of its political institutions throughout its history, and the framework within which the transition process has taken place”).

117. Juan M. del Aguila, *The Politics on Free Trade in Latin America*, 50 EMORY L.J. 759, 766 (2001).

118. See Barnes, *supra* note 105, at 160 (attributing the Chilean identification with the United States to “the democratic link[,] . . . the fact that a number of Chileans have been educated in this country, and . . . a common economic philosophy”).

119. See generally ALEJANDRO FOXLEY, LATIN AMERICAN EXPERIMENTS IN NEOCONSERVATIVE ECONOMICS (1983).

120. For example,

[i]n 1840, Chile created a commission to draft a new civil code. The commission consisted of five members, including Andrés Bello. After graduating in 1802 from the Royal and Pontifical University of Caracas, Bello held several official positions in his native Venezuela. After a stay in England where he had accompanied Simon Bolivar on a mission, he immigrated to Santiago, Chile, in 1819, where he stayed until his death in 1865. During that time he held several important posts in the Chilean government and was the main author of the new civil code that was implemented in 1857 and has been in effect ever since. The main influences of the Bello Code derived from Roman, Spanish, French, and other European laws. Subsequently, the Chilean Code was adopted by Colombia and Ecuador, and referenced by Argentina, Paraguay, Venezuela, El Salvador, and Nicaragua.

James Cooper, *Introducción a la Reforma Procesal Civil: Lecciones Acerca de la Reforma Jurídica [Introduction to the Reform of Civil Procedure: Lessons of Judicial Reform]*, DERECHO MAYOR, Apr. 2008, at 161, 167.

Pinochet era.¹²¹ In fact, the Chilean judiciary was often seen as part of the right-wing reactionary forces that oppressed the populace during the seventeen-year-long dictatorship.¹²² According to Lisa Hilbink, the courts in Chile became an explicit part of the compromise with Pinochet.¹²³ In addition to its poor record on the protection of human rights,¹²⁴ the judiciary also suffered from a number of inefficiencies, including the backlog of cases and other structural problems that plagued the administration of justice. These issues did not disappear, but were transferred to the new government when Chile returned to democracy in 1990.¹²⁵ Thus, “[i]n Chile, the military junta that was in power from 1973 to 1990 has

121. Reforms were not only interrupted, they were also reversed by repressive legal instruments such as those provided in the 1980 Constitution. See JUAN J. LINZ & ALFRED STEPAN, *PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE* (1996). Linz and Stepan note,

[T]he most constraining constitutional formula for a new democratic government is one where the incoming government has to agree to rule with an authoritarian constitution crafted by an outgoing authoritarian regime. Given General Pinochet's strong bargaining position, he was able to extract this price. The newly elected government in Chile agreed to begin their rule with the 1980 constitution (partially amended in 1989) and to try to eliminate its authoritarian features by the difficult constitutional amendment procedures stipulated in the constitution itself.

Id. at 206.

122. PEREIRA, *supra* note 103, at 92 (explaining how the Chilean military regime used old laws, “the Law of State Security, passed in 1958, and the Arms Control Law, passed under Allende in 1972,” in order to do what it saw as defending a “social and legal order that had been threatened by the Allende government”).

123. Lisa Hilbink, *An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary*, in WHAT JUSTICE? WHOSE JUSTICE? FIGHTING FOR FAIRNESS IN LATIN AMERICA 64, 76 (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., 2003). Another commentator agrees that

[t]he legal system was no obstacle to the policies of the military government, which were directed at eliminating its adversaries and imposing a new normative mold for human life on the country. In particular, the courts of appeal, directed by the Supreme Court, denied numerous habeas corpus petitions submitted to help those who were detained by the armed forces or the police and who were not brought before a judge. Acting in this way, the courts did not follow through with their constitutional and legal obligations, and graver still, caused the citizenry to lose confidence in the idea that there existed an institution of the State to which they could turn to protest abuses committed by government functionaries. That is to say, they helped destroy the legacy of the history of a country respectful of the law and of human rights.

Edmundo Fuenzalida Faivovich, *Law and Legal Culture in Chile, 1974–1999*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION, *supra* note 28, at 108, 129.

124. LISA HILBINK, *JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP I* (2007) (explaining that the courts gave the military government “nearly complete autonomy to pursue its ‘war’ against Marxism,” legitimized the “regime’s expansive police powers,” accepted governmental explanations about the “disappeared,” and implemented “arbitrary decrees, secret laws and policies that violated” the legal code).

125. DEZALAY & GARTH, *supra* note 5, at 228.

tried very hard to make itself immune to prosecutions.”¹²⁶ In the 1990s, that situation changed.¹²⁷ With the establishment of the Judicial Academy and a focus on new criminal procedures that promoted transparency, participation, and efficiency,¹²⁸ Chile began its reform process to bring about more access to justice.¹²⁹ Following years of economic reforms, transparency became paramount.

This transparency was much needed.¹³⁰ By 1995, Chile’s judiciary suffered from such a “decrepit structure and inefficient administration that . . . in Chile justice became terminally ill and, unless it undergoes major surgery, it [would be] condemned to death.”¹³¹ But with the end of the dictatorship in 1990, and the subsequent consolidation of democratic governance, which is “often held up as one of the most successful cases of democratic consolidation in Latin America,”¹³² Chile has been able to provide better access to justice.¹³³ The thriving academic community and

126. JOHN ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 64 (2004).

127. Cf. Hilbink, *supra* note 123, at 66 (noting that, “[e]ven after the transition to civilian rule in 1990, judges, with few exceptions, failed to take stands in defense of greater liberality; conservatism and conformity continued to reign within the judiciary hierarchy”).

128. See generally Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT’L L.J. 577 (1992–1993).

129. See Luis Manriquez Reyes, *Modernization of Judicial Systems in Developing Countries: The Case of Chile*, in JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN, PROCEEDINGS OF A WORLD BANK CONFERENCE 195 (Malcolm Rowat et al. eds., 1995) (examining the state of the Chilean legal system and the reasons that it needs to be reformed). There was also a general amnesty granted for the military with the return to democracy. See Robert J. Quinn, *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile’s New Model*, 62 FORDHAM L. REV. 905 (1994). For a detailed examination of the liberalization efforts by the Chilean Government in the post-Pinochet era, see HILBINK, *supra* note 124, at 179–89.

130. BUSCAGLIA, DAKOLIAS & RATLIFF, *supra* note 65, at 6 (writing in 1995, before major reforms were undertaken, that “[a]lthough Chile has perhaps the most highly regarded system in Latin America, respondents to this poll called their system ‘bad, inefficient, discriminatory, arbitrary and slow’”).

131. *Id.* at 6 (citing Grace Gibson & Cecilia Valenzuela, *Las penas de la justicia* [Sentences of Justice], QUÉ PASA (Santiago de Chile), Dec. 10, 1994, at 54). For the first quotation, see JUSTICIA Y MARGINALIDAD, PERCEPCIÓN DE LOS POBRES: RESULTADOS Y ANÁLISIS DE UN ESTUDIO EMPIRICO [JUSTICE AND MARGINALIZATION, PERCEPTIONS OF THE POOR: RESULTS AND ANALYSIS OF AN EMPIRICAL STUDY] 64 (Jorge Correa Sutil & Luis Barros eds., Instituto de Estudios Económicos Press 1992); see also Edgardo Buscaglia, *Judicial Reform in Latin America: The Main Obstacles Ahead*, J. LATIN AM. AFF., Nov. 1995, at 8; Edgardo Buscaglia, *Stark Picture of Justice*, FIN. TIMES, Mar. 21, 1995, at A13; James Cooper, Op-Ed., *Argentina and the Rule of Law*, SAN DIEGO UNION-TRIBUNE, Feb. 20, 2002, at B9.

132. Javier A. Couso, *The Judicialization of Chilean Politics: The Rights Revolution That Never Was*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA, *supra* note 50, at 105, 123. But cf. Wilson, *supra* note 6, at 526 (disagreeing and asserting that “[t]oday, Chile is still an incomplete democracy”).

133. See Michael Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. COMP. & INT’L L. 347 (1996) (exploring Chilean reforms in detail and explaining that reforms implemented to provide Chileans with better

its interactions with legislators and Ministry of Justice officials, as well as with bureaucrats from other state institutions, helped to build new state institutions such as the Public Defenders and National Prosecutors offices and to implement new criminal procedures.¹³⁴ Later, these functionaries filled law school faculties with part-time professors and assisted in consolidating reform efforts. In the late 1990s, Chile undertook an intensive reform process of its criminal procedure, region by region, transitioning from the inquisitorial model to the adversarial model.¹³⁵ Some \$638 million were spent in the process.¹³⁶ Although the Chilean Government had to delay the inauguration of the reform for a half year, until July 2005, in the metropolitan region of Santiago the new criminal procedures are now installed and functioning.¹³⁷

In reforming the Chilean legal system, foreign governments and their respective aid agencies, law school educators, and think tank experts have tendered much influence through the training of legal sector professionals.¹³⁸ While both the United States and Germany have played important roles in reforming various parts of the legal system in Chile, German influence dates back farther.

access to justice, including legal clinics for the poor, have succeeded in resolving some 100,000 cases out of court).

134. See Boletín No. 2365-07-1, Primer Informe de la Comisión de Constitución, Legislación y Justicia sobre el proyecto de ley que crea la Defensoría Penal Pública [First Report of the Constitutional, Legislative, and Judicial Commission on the Draft Law Creating a Criminal Public Defender's Office] (Nov. 16, 1999) (Chile), available at <http://sil.congreso.cl/pags/index.html>; Law No. 19.519, Sept. 16, 1997, D. OFICIAL No. 35.868 (Chile) (concerning the creation of the Public Ministry); see also Law No. 19.718, Mar. 10, 2001, D. OFICIAL No. 36.909 (Chile) (public defender law).

135. Carlos Rodrigo de la Barra Cousino, *Chile: Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J.L. & TRADE AM. 323 (1998).

136. See GOBIERNO DE CHILE, MINISTERIO DE JUSTICIA, [GOVERNMENT OF CHILE, MINISTRY OF JUSTICE] EL NUEVO SISTEMA PROCESAL PENAL CHILEÑO [THE NEW SYSTEM OF CHILEAN CRIMINAL PROCEDURE] (2007).

137. For examinations of Chilean legal reform efforts, see generally STEVEN LOWENSTEIN, LAWYERS, LEGAL EDUCATION, AND DEVELOPMENT: AN EXAMINATION OF THE PROCESS OF REFORM IN CHILE (International Legal Center 1970); Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. U. CHI. INT'L L. REV. 253 (2005); James P. Carey, *Reflection on Criminal Justice Reforms in Chile*, 2 LOY. U. CHI. INT'L L. REV. 271 (2005); John Henry Merryman, *Law and Development Memoirs I: The Chile Law Program*, 48 AM. J. COMP. L. 481 (2000); Hugo Rojas, *Cambios Sociales y Cambios Jurídicos en Chile: Construyendo Nuevos Puentes entre Sociología y Derecho en la Promoción del Realismo Jurídico Latinoamericano* [Social and Legal Changes in Chile: Building New Bridges Between Sociology and Law in the Promotion of Legal Reform in Latin America], 13 BERKELEY LA RAZA L.J. 453 (2002).

138. See Alfredo Fuentes-Hernández, *supra* note 89, at 44–46 (2002) (proposing that legal education in Latin America be redesigned to include an interdisciplinary curriculum educating law students in the values of democracy and on practical methods of how to contribute to the region's social and economic development).

III. THE GERMAN INFLUENCE IN CHILE

German influence on legal matters can be seen in many parts of the world.¹³⁹ It is most noticeable, however, in Chile. For Professor Anthony Pereira, Chile is distinguished by “its ‘Prussianization.’”¹⁴⁰ German influence on Latin America, and on Chile in particular, dates back to the Great Migrations.¹⁴¹ After achieving its independence in 1810, Chile sought to stimulate European immigration, primarily from Germany, the Austro-Hungarian Empire, and the Russian Empire. There was some success in attracting German immigrants to southern Chile, especially in the Lake District.¹⁴² Large-scale German immigration into Chile occurred primarily from 1850 to 1910.¹⁴³ Some of its major influences are visible today in Chilean architecture, food, and dress. Although the population never surpassed five percent of the population in the southern regions, the German influence fostered the nucleus of industrial progress, including the city of Valdivia, home of beer, mills, and Chile’s ship-building industry.¹⁴⁴ Until 1870, this German colonization was a success, and the southern region of Chile became the most dynamic economic sector in the country. The new citizens that Chile received from Germany brought an example of strong work ethic, honor, and commercial enterprise, bringing with them German know-how.¹⁴⁵

With this large-scale immigration came increased military cooperation between the Chileans and Germany. Between 1885 and 1931, there were five German military missions to the Chilean army, resulting in a Chilean military more vertical, cohesive, and rigid than the militaries of

139. Robin Wright, *Syria Seeking Deal in U.N. Probe*, WASH. POST, Sept. 23, 2005, at A15. For months after the assassination of former Lebanese Prime Minister Rafik al-Hariri on February 14, 2005, German Prosecutor, Detlev Mehlis, worked for the United Nations team established to investigate the bombing. Eventually, agents of the Federal Bureau of Investigation were brought in to examine evidence at the site of the bombing. See *FBI Joins Investigation into Lebanon's Latest Bombing*, ASSOCIATED PRESS, Sept. 28, 2005, available at http://www.usatoday.com/news/world/2005-09-28-lebanon-fbi_x.htm.

140. PEREIRA, *supra* note 103, at 48 (providing a study of institutional and personal relations between military and judicial elites in Brazil, Chile, and Argentina and how they form the foundation for state repression).

141. International Migrations, <http://www.ahtg.net/TpA/migrations.html> (last visited Jan. 17, 2008).

142. Chile—Population, <http://countrystudies.us/chile/38.htm> (last visited Jan. 17, 2008).

143. Colonización Alemana en Valdivia y Llanquihue (1850–1910) [German Colonization in Valdivia and Llanquihue (1850–1910)], http://www.memoriachilena.cl/temas/index.asp?id_ut=lacolonizacionalemanadevaldiviayllanquihue:1850-1910 (last visited Sept. 25, 2008).

144. See generally CARLOS SANHUEZA CERDA, *CHILEÑOS EN ALEMANIA Y ALEMANES EN CHILE: VIAJE Y NACIÓN EN EL SIGLO XIX* [CHILEANS IN GERMANY AND GERMANS IN CHILE: TRAVEL AND NATIONALITY IN THE NINETEENTH CENTURY] (2006).

145. See *id.*

their region.¹⁴⁶ One of the greatest German influences in Chile to date has been in the professionalization of the military.¹⁴⁷ Chile's army underwent German-style educational and training programs, used German manuals, employed German instructors both individually and in missions, and armed its troops with German equipment.¹⁴⁸ For example, many Chilean military personnel studied under the retired German Captain Emil Körner, who eventually rose to the rank of General in Chile.¹⁴⁹ The overarching impact of the German influence on the Chilean military was to stimulate political interest, and to motivate elitist, professional army officers to assume the responsibility of conducting national affairs.¹⁵⁰ This connection clearly influenced Chilean foreign policy. In the First World War, Chile did not side with the Allies against Germany.¹⁵¹ With the outbreak of the Second World War in 1939, the Chilean army, along with other major armies of South America, assumed firm "civil imperative" positions aimed at the maintenance of internal security and order.¹⁵² Chile remained neutral during the Second World War until 1943, when it eventually sided with the Allies.¹⁵³

The strong and influential German colony in the south of Chile made Chile a natural haven for Nazi war criminals after 1945.¹⁵⁴ Moreover, the Prussianization of Chile's military inevitably strengthened support of the troops and officers behind the *coup d'état* against the democratically elected government of Salvador Allende on September 11, 1973. From 1973 to 1989, Germany completely suspended development cooperation with Chile.¹⁵⁵ Bilateral cooperation between Chile and the Federal

146. PEREIRA, *supra* note 103, at 48.

147. Derick M. Nunn, *Effects of European Military Training in Latin America: The Origins and Nature of Professional Militarism in Argentina, Brazil, Chile, and Peru, 1890–1940*, 39 MIL. AFF. 1, 1–7 (1975).

148. *Id.*

149. *Id.*

150. *Id.*

151. Siegeskreuz: Außenminister Frank-Walter Steinmeier in Südamerika-Deutsch-Chilenische Militärkooperation [Cross of Victory: Secretary of State (F.R.G.) Frank-Walter Steinmeier in South America-German-Chilean Military Cooperation], AG Friedensforschung an der Uni Kassel [Organization for Peace Research at the University of Kassel], www.uni-kassel.de/fb5/frieden/regionen/chile/brd.html (last visited Mar. 11, 2008).

152. Nunn, *supra* note 147, at 2.

153. JOHN L. RECTOR, *THE HISTORY OF CHILE* 151–52 (2004) (finding that while there was widespread support among German-Chileans for the Axis Powers, President Juan Antonio Ríos and his "leftist supporters" opposed such support, and Chile remained neutral for much of World War II until pressure from the United States eventually convinced Ríos to break relations with the Axis powers in 1943, "in spite of fears of a German naval attack").

154. Die Emigration der NS-Täter nach 1945 [The Emigration of the National Socialist Offenders after 1945], <http://www.lbihs.at/LVText/BspReferat2004.pdf> (last visited Sept. 25, 2008).

155. GTZ, GTZ in Chile, <http://www.gtz.de/en/weltweit/lateinamerika-karibik/626.htm> (last visited Aug. 16, 2008).

Republic of Germany resumed in 1989 after the democratic election of the government of Patricio Aylwin, who took over following the Pinochet military dictatorship.¹⁵⁶ German university and consultancy employees were sent abroad to “sell” their version of laws.¹⁵⁷ They had success in spreading their legal culture in Eastern Europe as well as in the Baltic countries,¹⁵⁸ as Germany became a euphemism for progress.¹⁵⁹

By the mid-1990s, German government cooperation in Chile primarily focused on social development issues: education, health, and housing.¹⁶⁰ Like the U.S. government’s approach to the country, the German government considers Chile to be a developed country, given the advances made in economic development and improvement of the social infrastructure.¹⁶¹

156. Monte Reel, *Bachelet Sworn in as Chile’s President: Economic Development and Equality Top Goal*, WASH. POST, Mar. 12, 2006, at A12 (noting that during the Pinochet dictatorship, East Germany became a refuge for Chilean exiles from the left, including current President Michelle Bachelet).

157. See Siniša Petrović, *The Legal Regulation of Company Groups in Croatia*, 2 EUR. BUS. ORG. L. REV. 781, 781 (2001) (explaining that Croatia chose to adopt Germany’s company group law and comprehensively regulate in this area).

158. See Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 110 (1995) (noting that Russia and the rest of the former Soviet Union chose to promulgate versions of U.S. corporate and bankruptcy laws).

159. Neil G. McHardy, *The New German Immigration Act*, IMMIGR. L. TODAY, Jan./Feb. 2005, at 26 (announcing that, in addition to being thought progressive, “German laws are known for their precision”). One commentator noted that

[t]here is little question that the value placed on law-abiding behavior in German normative culture is very high indeed. That this may be paralleled by a much lower level of actual conformity is a possibility which need not concern us here. Respect for the law was throughout the nineteenth century one of the meeting grounds between modernized authoritarian traditions and the *Rechtsstaat* (government under the rule of law) ideals of the liberal opposition.

Dietrich Rueschemeyer, *Lawyers and Their Society*, in EUROPEAN LEGAL CULTURES, *supra* note 19, at 274, 275.

160. The German support for Chile in financial and technical cooperation from 1990 to 2006 had a budget of 450 million Euros (approximately \$590 million). See German Embassy in Santiago, *Entwicklungspolitische Zusammenarbeit* [Development Cooperation], http://www.santiago.diplo.de/Vertretung/santiago/de/05/Entwicklungspolitische_Zusammenarbeit/Entwicklungspolitische_Zusammenarbeit.html (last visited May 15, 2008). Germany is the most important trading partner for Chile in the European Union. *Bilaterale Beziehungen zwischen Chile und Deutschland* [Bilateral Relations between Chile and Germany] (Feb. 2008), <http://www.auswaertiges-amt.de/diplo/de/Laenderinformationen/Chile/Bilateral.html>.

161. With a GDP per capita of \$6,151 in 2005, Chile is classified by the World Bank as an upper middle income and moderately indebted economy. Chile is also considered the most competitive and the least corrupt economy in Latin America. Chile has distinguished itself in Latin America by its good economic performance (high growth rates, low inflation, and public sector surplus), and its economic growth rate reached 6.3 percent in 2005. See *The EU’s Relations with Chile*, in EUROPEAN COMMISSION: EXTERNAL RELATIONS § III (2006), available at http://ec.europa.eu/comm/external_relations/chile/intro/index.htm#III.%20Economic%20and%20trade%20relations.

The Chilean government asked the German government to support the drafting process of the new Criminal Procedure Code in 1995. That year, the German Embassy in Chile and GTZ organized a visit to Germany by the Chilean Minister of Justice, Maria Soledad Alvear.¹⁶² The Minister had several meetings with representatives of the German government in order to promote her request for legislative assistance. In January 1996, GTZ sent the first evaluation group to Chile to work on a project proposal.¹⁶³ Finally, in March 1996, during the intergovernmental negotiations between Germany and Chile, the two governments agreed on a project that was designed to last ten years, with a volume of ten million German Deutschemarks (approximately 5 million Euros).¹⁶⁴ The project was to be executed in three different phases. The first part of the project lasted three and half years, from June 1998 to December 2001, with a total financial volume of 4.2 million German Deutschemarks (approximately 2.1 million Euros).¹⁶⁵

It was not until October 1998, that the project (GTZ Project Number 95.2216.0) began. The first head of the project was Cornelius Prittwitz, a well-known German law professor and judge, who now teaches at Frankfurt University.¹⁶⁶ In April 2002, the German and Chilean governments agreed on the contents of the second project phase.¹⁶⁷ As the Code of Criminal Procedure had already been approved by the Chilean Congress, the project was expanded to include the drafting process of a new law on prisoners' rights, a new code on criminal offences, and a reform of the juvenile justice system (GTZ Project Number 2001.2239.0). A budget of 5.5 million German Deutschemarks (approximately 2.7 million Euros) was to be spent over the four years spanning from April 2002 to March 2006. Nevertheless, some 1.5 million German Deutschemarks were unspent during the first part of the project. The German-Chilean binational project ended in December 2006 without a further financial commitment. As Chilean economic numbers improved, and as the new Code of Criminal Procedure was fully operating, the project did not require a third phase. In the end, the overall project lasted eight and a half years rather than the original ten years that were anticipated.¹⁶⁸

162. See GTZ, Final Internal Report on the Schlussbericht (2006) (on file with GTZ headquarters) [hereinafter Final Report on the Schlussbericht].

163. See Internal Memorandum from Patricio Vallepin, Informe Taller de Planificación ZOPP [Report Planning Workshop ZOPP] (1996) (on file with GTZ headquarters).

164. See GTZ, Internal Report on Unterstützung der Implementierung des neuen Strafverfahrensrechtes, GTZ Project No. 95.2216.0 (1996) (on file with GTZ headquarters).

165. See *id.*

166. See Prof. Dr. jur. Cornelius Prittwitz—CV, http://www.jura.uni-frankfurt.de/fkur1/prittwitz/Mitarbeiter/Mit_Prittwitz/CV_Prittwitz/index.html (last visited Mar. 30, 2008).

167. GTZ FINAL REPORT, *supra* note 3, § 1.

168. See Final Report on the Schlussbericht, *supra* note 162.

The GTZ project was quite entrepreneurial in developing and executing a number of studies, policies, legislative projects,¹⁶⁹ educational programs, and public education campaigns. There were significant exchanges with experts from both countries.¹⁷⁰ Such cross-fertilization grew further, with Chilean prosecutors visiting Paraguayan prosecutors in Asunción to share common links and investigative techniques, as well as visits to German institutions. In the last several years, GTZ has supported the democratization process in Chile, in part through a project for the implementation of new criminal procedures and laws for prisoners' rights. Legal and institutional foundations based on the rule of law are being laid for modern criminal proceedings, which increase the predictability of state actions and thus enable sounder individual and economic decision-making.¹⁷¹

The technocrats at GTZ have also been asked to assist in the reform of the civil procedure code, which is not unsurprising given the influence of the German Civil Code in much of Latin America.¹⁷² According to Venezuelan lawyer Andrés Bello (considered the father of the Chilean Civil Code and others around the region), in his message of the Executive to Congress Proposing the Adoption of the Civil Code in 1857, "[t]he arrangement that I have described resembles an institution that has existed in some German states for a while. Other civilized nations aspire to follow suit."¹⁷³

GTZ has also enjoyed great success in developing and executing programs regarding the education of citizenry, prisoners' rights reform, and so forth. GTZ has taken a lead in the criminal procedure reform, training a majority of operators in the legal system, including *Carabineros*, Public

169. McHardy, *supra* note 159, at 26.

170. GTZ FINAL REPORT, *supra* note 3, § 2.4.

171. See Roland A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. Rev. 941 (1995). Cass explains that a "critical aspect of the commitment to the rule of law . . . is the promise that the government's force will be brought to bear on individuals—especially in criminal proceedings . . . only after fair warning." *Id.* at 954. This is important because "[p]redictability allows adjustments of individual behavior that increase societal well-being; increased predictability lowers costs associated with a decision." *Id.* at 960 (citation omitted).

172. For an examination of German civil law, see generally PETER L. MURRAY & ROLF H. STURNER, *GERMAN CIVIL JUSTICE* (2004). The Civil Code of Germany, *Bürgerliches Gesetzbuch*, was promulgated in 1900, during the Bismark Empire. ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 402 (2006) (citing Bernardino Bravo Lira, *Civil Codification in Iberian America and on the Iberian Peninsula (1827–1917): National v. Europeanized Law*, in *FUENTES IDEOLÓGICAS Y NORMATIVAS DE LA CODIFICACIÓN LATINOAMERICANA [IDEOLOGICAL AND NORMATIVE SOURCES OF THE LATIN AMERICAN CODIFICATION]* (1992)); see also KONRAD ZWIGERT & HEIN KOTZ, *INTRODUCTION TO COMPARATIVE LAW* 143 (Tony Weir trans., 1998). For more about civil procedure reform in Chile, see Cooper, *supra* note 120.

173. OQUENDO, *supra* note 172, at 420 (citing ANDRÉS BELLO, MESSAGE OF THE EXECUTIVE TO CONGRESS PROPOSING THE ADOPTION OF THE CIVIL CODE (1857)).

Ministry and Justice Ministry officials, investigative police, prison authorities, and the judiciary.¹⁷⁴ As an example, GTZ enabled hundreds of detectives from the Policía de Investigaciones to train in Germany for two weeks in order to share policing policies and preventive detention procedures. GTZ also, in collaboration with Hamburg Police Chief Reinhard Bromm, entered into a cooperation agreement between the Hamburg Police and *Carabineros*; this agreement helped to train thousands of *Carabineros* in Chile. Despite such successes, however, there remain issues over whether the *Carabineros* and Public Ministry are working well together, and whether the transition from the inquisitorial model to adversarial model has been implemented successfully. Issues of chain of custody of evidence, the responsibility for case management, and common procedures for integrated services must also be addressed. Too often, the *Carabineros* wish to prosecute the “old” way, by extracting confessions.¹⁷⁵

Even though there is no public defender institution in Germany, GTZ also made inroads with the Public Defenders of Chile, developing programming and educational materials on international human rights law and on how to use it in Chilean judicial proceedings.¹⁷⁶ GTZ’s publications included early works examining the need to move from theory to practice,¹⁷⁷ and how to use alternative sentencing in the new criminal procedures.¹⁷⁸ With the Public Ministry, GTZ published its evaluation of the Chilean Criminal Procedure reform, even stating “from the perspective of the German system” in the title.¹⁷⁹

174. GTZ FINAL REPORT, *supra* note 3, § 2.4. A cooperation agreement between the Hamburg, Berlin, and Chilean police included visits for training and a cooperation agreement between the Hamburg and Chilean district attorneys.

175. Meredith Fensom, *Judicial Reform, Military Justice, and the Case of Chile's Carabineros*, INT'L L.Q., Summer 2007, at 1, 1–2, available at http://www.internationallawsection.org/modules/Static_Docs/data/International%20Law%20Quarterly/20070701_ILQ.pdf.

176. See, e.g., MANUAL DE DERECHO INTERNACIONAL DE LOS DERECHOS HUMANOS PARA DEFENSORES PENALES PÚBLICOS [MANUAL OF INTERNATIONAL HUMAN RIGHTS LAW FOR CRIMINAL PUBLIC DEFENDERS] (Centro de Documentación Defensoría Penal Pública 2003).

177. See CECILIA POMAREDA DE ROSENAUER & JÖRG ALFRED STIPPEL, EL NUEVO CÓDIGO PROCEDIMIENTO PENAL. DE LA TEORÍA A LA PRÁCTICA. A TRAVÉS DE CASOS DESARROLLADOS [NEW CODE OF CRIMINAL PROCEDURE FROM THEORY TO PRACTICE. THROUGH DEVELOPED CASES] (2001).

178. PRINCIPIO DE OPORTUNIDAD Y SALIDAS ALTERNATIVAS AL JUICIO ORAL EN AMÉRICA LATINA [THE PRINCIPLE OF OPPORTUNITY AND ALTERNATIVE OUTCOMES TO TRIALS IN LATIN AMERICA] (Jörg Stippel & Adrián Marchisio eds., 2002).

179. EVALUACIÓN DE LA REFORMA PROCESAL PENAL CHILENA DESDE LA PERSPECTIVA DEL SISTEMA ALEMÁN [EVALUATION OF THE CHILEAN PENAL REFORM FROM THE PERSPECTIVE OF THE GERMAN SYSTEM] (Andres Ritter, Detlev Achhammer & Hector Hernández Basualto eds., Sociedad Alemana de Cooperación Técnica 2003).

GTZ has also delved into the reform of Juvenile Law, promoting legislation on rehabilitation and the better treatment of juveniles in criminal procedures in accordance with the Chilean Constitution and the U.N. Convention on the Rights of the Child.¹⁸⁰ This was a priority under both the administration of Ricardo Lagos and that of Michelle Bachelet.¹⁸¹ In July 2004, GTZ brought Joachim Walter, Chief of the Youth Penitentiary Center in Adelsheim, Germany, to Chile to work with the juvenile justice legal reform project and with Chilean government authorities on prison conditions for juvenile offenders. With this impetus, GTZ facilitated reform in the penitentiaries, leading legislative efforts to change the treatment of juveniles, facilities for rehabilitation, and early intervention and prevention programs.¹⁸² The commission, made up of Jorg Stippel, the Justice Ministry, and other experts, has presented its law to the Minister of the Judicial Committee of the Chilean Congress. It is now a priority of the government, and there is hope that a new law will soon be making its way through the legislative process.¹⁸³ German expertise once again played a leadership role in shepherding legislation through Congress, training legal sector operators, and creating binational cooperation agreements between institutions to secure more sustainable efforts beyond the five-year life of the GTZ rule of law project.

Perhaps the most innovative part of the rule of law work done by GTZ from January 2001 to December 2006 was in the area of dissemination work. GTZ pioneered legal technology transfer by co-producing a number of multimedia products. These projects included

180. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; Establece un sistema de responsabilidad de los adolescentes por infracciones a la ley penal [Law establishing a system of responsibility of juveniles for infractions of criminal law], Ley No. 20.084, Nov. 2, 2005, D. OFICIAL No. 38.778 (Chile).

181. Unicef.org, The Americas, http://www.unicef.org/say_yes/americas.htm (last visited Aug. 16, 2008) (discussing how Richard Lagos launched the National Policy and Integrated Plan of Action for Children and Adolescents). Under President Michelle Bachelet,

a new juvenile justice system reform law took effect. It establishes a more rehabilitative approach to juvenile delinquency and creates a specialized system of detention facilities for minors. The law makes the government's National Children's Service (SENAME) responsible for providing the necessary infrastructure and implementing the reforms and the Gendarmería responsible for providing security for the juvenile detention facilities. To meet these requirements, the government invested more than \$19 million (10 billion pesos) in programs and facilities.

U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2007—CHILE, Mar. 11, 2008, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100632.htm>.

182. See JÖRG ALFRED STIPPEL, *LAS CÁRCELES Y LA BÚSQUEDA DE UNA POLÍTICA CRIMINAL PARA CHILE* [PRISONS AND THE SEARCH FOR A CRIMINAL POLICY FOR CHILE] (2006).

183. See Ministerio de Justicia [Ministry of Justice], <http://www.minjusticia.cl> (follow "prioridades" hyperlink) (last visited Sept. 23, 2008) (Chile).

CDs and DVDs containing information about law reforms partnered with public institutions. Among other participants, these institutions included the Public Ministry, the Public Defenders Office,¹⁸⁴ the Judicial Academy, *Carbineros*, the National Commission on Youth, the Investigative Police, the Goethe Institute, the Konrad Adenauer Foundation, and the Heidelberg Center for Latin America.¹⁸⁵ Some of the footage was based on both experiential learning and traditional lectures from workshops and conferences held by GTZ and leading Chilean universities. International conventions on human and civil rights were included, as was up-to-date Chilean legislation. Additionally, GTZ partnered with a number of local stakeholders and non-governmental organizations that worked in rule of law promotion to educate the general public on the benefits of the rule of law and the new legal reforms.

One of the most impressive parts of GTZ's operations was their relationship with the Coordinating Unit of the Criminal Procedure Reform within the Chilean Ministry of Justice. In fact, GTZ's office was located on the seventh floor of the Ministry of Justice building on Calle Moneda on Constitution Square in downtown Santiago, right beside the interdisciplinary Coordinating Unit dedicated to implementing the new criminal procedures. Meanwhile, the U.S. Embassy worked in their compound ("el bunker"), and onerous security checks made meetings close to impossible (laptops and cellular telephones were banned from the building).¹⁸⁶ Meetings had to take place at a nearby Starbucks to allow for laptop computers.¹⁸⁷ Beyond budgeting differences—GTZ's budget was far bigger and its programming far more consistent over several years than the piecemeal approach of the U.S. Embassy—the dynamic of proximity and programmatic planning further enabled GTZ to have direct influence over many aspects of the criminal procedure itself and its rollout around Chile.¹⁸⁸

184. See DEFENSORÍA PENAL PÚBLICA, MEMORIA ANUAL DEFENSORÍA PÚBLICA [ANNUAL REPORT OF THE CRIMINAL PUBLIC DEFENDER] 136 (2005), available at <http://www.defensoriapienal.cl/interior/defensoria/cuenta.php>.

185. GTZ FINAL REPORT, *supra* note 3, §§ 2.4–2.5.

186. Email from Norma de Solminihac, Cultural Affairs Section, Embassy of the United States of America, Santiago, Chile (Apr. 23, 2008) (on file with the author); Email from Norma de Solminihac, Cultural Affairs Section, Embassy of the United States of America, Santiago, Chile (May 8, 2008) (on file with the author) [hereinafter Solminihac Email (May 8, 2008)].

187. Solminihac Email (May 8, 2008), *supra* note 186.

188. Since 2001, the German government was focused on cooperation with Chile on modernization of the government and the protection of natural resources. See Auswärtiges Amt—Chile: Bilaterale Beziehungen zu Deutschland [Foreign Office—Chile: Bilateral Relations with Germany], <http://www.auswaertiges-amt.de/diplo/de/Laenderinformationen/Chile/Bilateral.html#t4> (last visited Sept. 12, 2008).

German influence over Chilean legal culture also came from the Konrad Adenauer Foundation (headquartered in Buenos Aires, Argentina, and with offices in Santiago de Chile), which has funded research projects on criminal procedural reform since 1997.¹⁸⁹ Linked to a German political party, its Rule of Law Program investigates criminal justice reform in Latin America.¹⁹⁰ The Foundation brought together legal scholars from fifteen Latin American countries to prepare national reports for their own jurisdictions. By March 2000, the panel had prepared a comparative profile of the questionnaire data and held a conference with the Max Planck Institute for Foreign and International Criminal Law at the Albert-Ludwigs-Universität Freiburg (Freiburg University) to present the results of the study.¹⁹¹

The Max Planck Institute has also played a role in developing academic relations with Latin American countries, including Chile. Developed out of a 1938 seminar on foreign and international criminal law at Freiburg University by Adolf Schönke, the Institute was created in 1954 as a public foundation of the Federal Republic of Germany, the State of Baden-Württemberg, and the University of Freiburg.¹⁹² In 1966, the Institute was incorporated into the Max Planck Society, and in 1970, the Institute started research in the field of criminology.¹⁹³ Its Department of Criminal Law focuses on German and foreign criminal law, criminal procedure, law of penal administration, comparative criminal law, international cooperation in criminal matters (including the law of extradition and the law of international mutual assistance), international criminal law, criminal law problems in a reunified Germany, and a comparative

189. See, e.g., Arne Dettman, Konrad-Adenauer-Stiftung [Konrad-Adenauer Found.], *Strafjustizreform: Mehr Effizienz und Transparenz* [Criminal Reform: More Efficiency and Transparency] (June 17, 2005), available at http://www.kas.de/proj/home/pub/52/1/year-2005/dokument_id-6839/index.html (describing that the Konrad Adenauer Foundation supported the reform in a report published after the reform came into effect). That the leading study on Chilean legal culture, *Evolución de la cultura jurídica chilena* [Evolution of the Chilean Legal Culture], was published with funding from the Konrad Adenauer Foundation speaks volumes about the influence the Germans have enjoyed in Chile. PEÑA ET AL., *supra* note 6.

190. Max-Planck-Institut für Ausländisches und Internationales Strafrecht [Max Planck Institute for Foreign and International Criminal Law], *Strafverfahrensreform in Lateinamerika* [Criminal Justice Reform in Latin America], http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/gemeinsame_projekte/archiv/strafverfahrensreform.htm (last visited Sept. 25, 2008).

191. See LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA [CRIMINAL JUSTICE PROCEDURAL REFORM IN LATIN AMERICA] (Julio B.J. Maier et al. eds., 2000).

192. Max-Planck-Institut für Ausländisches und Internationales Strafrecht [Max Planck Institute for Foreign and International Criminal Law], *Geschichte und Entstehung des Institutes* [History and Development of the Institute], <http://www.mpicc.de/ww/de/pub/organisation/ueberblick/institutsgeschichte.htm> (last visited Sept. 25, 2008).

193. *Id.*

study of law and coming to terms with the past (after a regime change), as well as law and medicine.¹⁹⁴

Along with these institutions, the University of Heidelberg has opened its own campus in Chile, called the Heidelberg Center for Latin America, in the Providencia neighborhood of Santiago. Programs include a Master's degree program (LL.M.) in International Law (with a focus on investments, trade, and arbitration), in partnership with the Institute of International Studies at the University of Chile and the Max Planck Institute for Comparative Public Law and International Law.¹⁹⁵

In addition to German university programs, German law professors have long been popular in Chile. For example, Professor Kai Ambos is a frequent visiting professor to Chile and the director of the law journal *Coleccion de Derecho Penal*.¹⁹⁶ Additionally, German criminal law professor Claus Roxin's work was cited in a petition for injunction to the Court of Appeals of Santiago.¹⁹⁷ The popularity of German academicians is part of the strong influence that German legal culture has played in Chile over the years. Yet there have long been detractors as well. Andrés Bello wrote:

We are too much under the influence of Europe. While we take advantage of its culture, we should also imitate its independence of thought . . . Chilean youth, learn to judge for yourselves, aspire for independence of thought. This is the first philosophy that we should learn from Europe.¹⁹⁸

194. Max-Planck-Institut für Ausländisches und Internationales Strafrecht [Max Planck Institute for Foreign and International Criminal Law], Abteilungen [Departments], <http://www.mpicc.de/www/de/pub/organisation/wissenschaft/forschungsgruppen.htm> (last visited Sept. 25, 2008).

195. For further discussion, see Ruprecht-Karls-Universität Heidelberg, Masters of Laws in International Law (LL.M.int) 2006, http://www.heidelberg-center.uni-hd.de/english/kurs_master_jur_2006.html (last visited Sept. 25, 2008). A Master's degree in European Political Studies and a Doctorate degree in Pharmacology are among the other offerings, in association with the Catholic University of Chile. University of Heidelberg, Courses, <http://www.heidelberg-center.uni-hd.de/english/kurse.html> (last visited Sept. 25, 2008).

196. See Vita Breve of Prof. Dr. Kai Ambos, available at <http://lehrstuhl.jura.uni-goettingen.de/kambos/Person/Vita-english.html> (last visited Sept. 25, 2008); see also *Colección de Derecho Penal* [Collection of Criminal Law], http://www.dpenal.cl/CDP/_main.htm (last visited Sept. 25, 2008) (noting that the director of the *Colección de Derecho Penal* is Professor Kai Ambos).

197. Petition for Injunction, Honorable Court of Appeals, Santiago (Jan. 27, 2008), available at http://www.memoriayjusticia.cl/english/en_docs-supreme.html.

198. Andrés Bello, *Modo de estudiar la historia* [A Way to Study History], in *OBRA COMPLETA DE ANDRÉS BELLO* [COMPLETE WORKS OF ANDRÉS BELLO] 124 (Ministerio de Educación [Ministry of Education] 1951) (1884).

IV. U.S. INITIATIVES IN CHILE

It is not true that the United States feels any land hunger or entertains any projects as regards the other nations of the Western Hemisphere save such as are for their welfare. All that this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our hearty friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States.

—Theodore Roosevelt¹⁹⁹

Since the 1960s, law reform experts and legal educators from the United States, through granting institutions, government programs, and educational exchanges, have undertaken a number of initiatives to assist Chile in rule of law promotion efforts.²⁰⁰ U.S. legal culture has had significant influence on Chilean legal institutions, legal education, the legal profession, the practice of law, and the rules that pervade the legal system. Much of this influence occurred at a time when the U.S. government funded a number of other projects around the developing world.²⁰¹ Lawyers from the American Society of International Law, the Council on Foreign Relations, the American Bar Association, and the U.S. government, as well as U.S. academicians and judicial administrators, crisscrossed the globe to spread the seeds for positive change and lay the foundations for modernization. The Law and Development movement of that period was an effort to export a set of institutions and practices intended to build the rule of law.²⁰² At that time, there was no

199. Roosevelt Corollary to the Monroe Doctrine, Address to U.S. Congress (Dec. 6, 1904), available at <http://www.latinamericanstudies.org/us-relations/roosevelt-corollary.htm>.

200. Dezalay & Garth, *supra* note 39, at 307 (noting that “[l]aw in the United States historically has been able—indeed expected and desired—to gain the position of setting the key terms of legitimacy”).

201. MIROW, *supra* note 64, at 168 (noting that the “twentieth century private law was marked by significant indigenous legal development coupled with a long-term shift away from European continental sources toward U.S. sources as important models for borrowing”).

202. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of Law and Development Movement*, 25 AM. J. COMP. L. 457, 461 (1977); Francis G. Snyder, *Law & Development in the Light of Dependency Theory*, 14 LAW & SOC’Y REV. 723, 728–29 (1980); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1065 (1974); David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972). But see David M. Trubek, *Law and Development Then and Now*, 90 AM. SOC’Y INT’L L. 223 (1996) (arguing a different view, which approved of a “new” law and development movement grounded in the

real competition from Europe, which was preoccupied with putting its economic house in order and integrating through the European Communities project.²⁰³

Legal education has long been a venue for work by U.S. educators and development specialists.²⁰⁴ Professors from Stanford University Law School led the way for U.S. influence in Chilean legal culture in the 1960s.²⁰⁵ Funded by the Ford Foundation,²⁰⁶ the Chile Law Program showcased the Law and Development movement and was designed to modernize Chilean legal education and legal research.²⁰⁷ Proposed reforms demonstrated various U.S.-style law school teaching methods such as the Socratic method.

The classes took place at Stanford University for a total of sixteen weeks.²⁰⁸ During the seminars, the Chilean scholars discussed assigned readings and worked on a prospectus, incorporating the new methods learned.²⁰⁹ After the seminar ended, the Chilean scholars returned to their respective law schools and continued to consult with a U.S. law professor. At the end of three years, the Chilean scholars established the Instituto de Docencia y Investigaciones Jurídicas in Santiago to ensure that some of the initiatives in legal education would be sustained.

human rights "movement"); see also Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 LAW & SOC'Y REV. 93, 94 (1998) (criticizing "old" law and development for being "ethnocentric, naïve, and imperialistic").

203. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11. During the period of time from 1958 through the 1970s, the European Economic Community was growing in number and in breadth of control. For a concise, authoritative synopsis of the amendments to the Treaty, see Europa, Treaty Establishing the European Economic Community, http://europa.eu/scadplus/treaties/eec_en.htm (last visited Sept. 25, 2008).

204. See generally LOWENSTEIN, *supra* note 137 (discussing the legal education in Chile in the 1960s and 1970s); David S. Clark, *The Idea of the Civil Law Tradition*, in COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY 11, 12 (David S. Clark ed., 1990) (arguing that legal education is a natural place from which to influence legal cultures abroad and that "*jus commune* was exported by the Spanish and the Portuguese to America in the sixteenth century, where it was effectively disseminated through the universities established in the New World").

205. See Merryman, *supra* note 137, at 481. Professor Merryman was involved in two "law and development" projects in Chile, one of which, "the Chile Law Program, had modest ambitions and, until it fell victim to larger political events in Chile, promised to be modestly effective The other was a quite different project with grander ambitions, called SLADE (for Studies in Law and Development), that has yet to meet the expectations of those who were involved in it." *Id.*

206. See FORD FOUND. MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF THE FORD FOUNDATION GRANTEES AROUND THE WORLD 372 (Mary McClymont & Stephen Golub eds., 2000).

207. See Merryman, *supra* note 137, at 486–89 (detailing Stanford's attempt at law reform in the 1960s and its program to train Chilean law professors).

208. *Id.* at 487.

209. *Id.* at 487–88.

Although the seminars were considered useful by Chilean professors, the Chilean government under both Salvador Allende and General Augusto Pinochet grew increasingly suspicious of U.S. involvement in the law schools,²¹⁰ and government pressures forced the program to close.²¹¹ Several scholars went on to incorporate what they learned into their own courses,²¹² but the political climate did not allow for much progressive change in legal education.²¹³ It is no surprise that the first Law and Development movement waved the white flag soon thereafter.²¹⁴ According to Dezalay and Garth, “[m]ost of the legal transplants either fail outright or are largely unsuccessful, yet the process of transplanting continues apace—and has done so in varying degrees for centuries.”²¹⁵ While many of the proponents of the Law and Development movement continued their work in other arenas, mostly domestic, there were some who continued to believe that modeling would work in the drive towards modernization. Some critics of the movement lamented the quick withdrawal.²¹⁶

A second generation of the Law and Development movement began with the end of the Argentine, Chilean, and Bolivian dictatorships and the fall of Communism in Eastern and Central Europe in 1989 and in the Soviet Union in 1991. This coincided with the return to the barracks of the military across Latin America. In 1988, General Pinochet organized a national referendum on the continuation of his regime. In advance of the plebiscite, the U.S. Congress voted to give \$1 million to the National Endowment for Democracy for use in Chile, and the U.S. Agency for International Development (USAID) provided money for voter

210. *Id.* at 491.

211. For some analysts, a dictatorship should be no impediment to promoting the rule of law. See Stephen Meili, *Legal Education in Argentina and Chile*, in *EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY* 138 (Jeremy Cooper & Louise G. Trubek eds., 1999) (exploring fieldwork observations of the teaching of social justice in Argentine and Chilean law schools).

212. Merryman, *supra* note 137, at 495.

213. *Cf.* Wilson, *supra* note 6, at 576–77 (attributing the success of Augusto Pinochet’s 1973 *coup d’état* to the “progressive, Socialist government that gave birth to, among other things, social consciousness and a nascent law school clinical movement”).

214. Dakolias, *supra* note 79, at 229–31 (distinguishing failed “law and development” efforts transplanted by outsiders in Latin America in the 1960s and 1970s from internal “second generation” judicial reform of the 1980s and 1990s that occurred when democracy was more firmly rooted in the region and had a broad support base, and finding that current specific country-tailored efforts “have the potential to be successful in Latin America”); Merryman, *supra* note 202 (providing a eulogy of sorts for the Law and Development movement); Trubek & Galanter, *supra* note 202; see also GARDNER, *supra* note 52, at 3.

215. DEZALAY & GARTH, *supra* note 5, at 246.

216. See Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470 (1995).

registration efforts.²¹⁷ Having lost the referendum, General Pinochet left the President's office, and military rule gave way to a democratically elected coalition government in 1990.

In 1995, USAID contracted the Corporación de Promoción Universitaria (CPU) in Chile to coordinate training of Chilean professionals in Alternative Dispute Resolution, resulting in two mediation centers opening in 1993.²¹⁸ This collaboration lasted only until 1996, the year that USAID pulled out of Chile,²¹⁹ leaving the U.S. Embassy in Santiago with the task of promoting reform. The Embassy has built on its focus since 1990 to include the strengthening of democratic institutions, with particular emphasis on the judicial system. Through 2005, the U.S. Embassy poured \$1 million into programs, including drafting the new criminal procedure code (from 1995 to 1997) and subsequent training for operators in the legal system.²²⁰

Initially, the U.S. government organized tours for judicial sector members (judges, prosecutors, justice ministry officials) from Chile through the U.S. Information Service and USAID. From 1990 to 1994, the U.S. Embassy brought over thirty of these members, some of whom grew to be influential in the criminal procedure reform. By 1995, the U.S. Embassy focused its efforts on training, partnering with Fundación Paz Ciudadana and California Western School of Law's Proyecto ACCESO²²¹ to provide all members of the judicial sector with the skills necessary to sustain the reform and ensure that new oral trials would be implemented effectively. For the most part, a veteran of more than thirty years in the diplomatic world of Chile, Monica Alcalde, shepherded projects as the U.S. Embassy's public affairs officers rotated in and out of Santiago every three years. Some innovative, yet unsustainable, programming came out of budgets provided by what is now the Bureau of International Narcotics and Law Enforcement Affairs of the U.S. Department of State.²²² U.S. Embassy programming also included intro-

217. Barnes, *supra* note 105, at 169–70.

218. USAID, Alternative Dispute Resolution Activities in Latin America and the Caribbean, http://www.usaid.gov/locations/latin_america_caribbean/democracy/adr/dg_conflict2b.html (last visited Sept. 25, 2008).

219. See USAID, REDUCING URBAN AND INDUSTRIAL POLLUTION IN CHILE (Dec. 2000), available at http://pdf.usaid.org/pdf_docs/pnacg619.pdf.

220. Interview with Monica Alcalde and Judith Baroody, Embassy of the United States of America, Santiago, Chile (Mar. 1, 2007) (on file with the author); Email from Raul Acevedo, Accounting Coordinator, Public Affairs Office, Embassy of the United States of America, Santiago, Chile (Mar. 16, 2007) (on file with the author).

221. See Proyecto ACCESO, <http://www.proyectoacceso.com> (last visited Sept. 25, 2008); see generally James M. Cooper, *Proyecto ACCESO: The Use of Popular Culture to Build the Rule of Law in Latin America*, 5 RUTGERS J.L. & PUB. POL'Y 378 (2008).

222. Bureau of International Narcotics and Law Enforcement Affairs, <http://www.state.gov/p/inl> (last visited Aug. 14, 2008); see also U.S. DEP'T OF STATE, 2007 CHILE

ductions to mediation, arbitration, intellectual property rights enforcement, judicial review, and some indigenous rights training.²²³ Much of the time, an expert would be flown from the United States and shuttled around Chile to speak to stakeholders, educate legal sector leaders, and provide introductions to their respective areas of expertise.²²⁴ Since 2005, the programs at the U.S. Embassy have run on shoestring budgets out of the U.S. Embassy in Santiago.²²⁵

With the consolidation of democratic governance in Chile throughout the 1990s, academicians returned to Chile to continue work on legal education development.²²⁶ Other U.S. law schools, such as American University, California Western School of Law, and McGeorge School of Law joined the earlier work undertaken by Stanford Law School and developed programs in Chile. Indeed, legal education continues to be an effective tool in spreading U.S. influence in legal cultures around Latin America, partly funded privately by the elite in Chile, and partly provided for by U.S. taxpayers through the Fullbright Scholarship program.

This focus builds on the history and success of technocrats from around Latin America trained in the discipline.²²⁷ These technocrats work in Wall Street institutions, international financial institutions,²²⁸ and other

SECTION: INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (Mar. 2, 2007), available at <http://www.usembassy.cl/> (follow "News Archive" hyperlink; then follow "Reports Prepared by the U.S." hyperlink; then follow "2007 Chile Section" hyperlink) (last visited Sept. 12, 2008).

223. U.S. Dep't of State, Radio Broadcast, *Dimensión Internacional: Intellectual Property Rights* (May 16, 2008), available at <http://www.usembassy.cl/> (follow "News Archives" hyperlink; then follow "Trade/Economy/Intellectual Property" hyperlink; then follow "Radio Program: Intellectual Property Rights" hyperlink) (last visited Aug. 14, 2008); see also, REID, *supra* note 7, at 28 (discussing the Latin American States' histories of borrowing and adapting other regions' philosophical disciplines, "[f]rom the Jesuits and scholasticism, to liberalism and positivism, corporatism and Marxism—and liberalism again—Latin American countries have drawn from the same European political philosophies and often adapted them to the conditions of the New World in similar ways" (citing HOWARD WIARDA, *THE SOUL OF LATIN AMERICA: THE CULTURAL AND POLITICAL TRADITION* (2001))).

224. See Intellectual and Industrial Property Rights are being Analyzed by U.S. Specialists With Chilean Judges in Iquique and Valparaíso, <http://www.usembassy.cl/> (follow "News Archive" hyperlink; then follow "Embassy Activities outside of Santiago" hyperlink; then follow "Intellectual and Industrial Property Rights are being Analyzed by U.S. Specialists With Chilean Judges in Iquique and Valparaíso" hyperlink) (last visited Sept. 12, 2008).

225. CAROTHERS, *supra* note 19, at 170 (finding that the results of U.S. efforts to promote rule of law reform have been disappointing, the projects, "launched with enthusiasm—and large budgets—in the late 1980s and early 1990s have fallen far short of their goals").

226. See generally Meili, *supra* note 211, at 138; Janet Ellen Stearns, *Reflections on Teaching in Chile*, 48 J. LEGAL EDUC. 110 (1998).

227. See Dezalay & Garth, *supra* note 39, at 312 ("Within the countries that are the leading global producers of the rule of law, above all the United States, the prevailing hierarchy of professions and disciplines therefore plays a major role in warding off scrutiny of the production and legitimation of law itself.").

228. SLAUGHTER, *supra* note 43, at 5.

powerhouses of finance.²²⁹ There is also competition to educate the technocrats in a certain way of thinking, not unlike the Chilean economists called “the Chicago Boys.”²³⁰ These kinds of groups, according to Anne-Marie Slaughter, form networks capable of producing a “transnational consensus on specific rules and approaches.”²³¹ They also promote free market economics, focus on strengthening judicial procedures, and ensure corporate law rights like shareholder remedies, repatriation of profits, and the protection of industrial property.²³² Other technocratic groups promote the practice of international commercial law in the form of large corporate law firms, a fixture in the United States and another manifestation of the influence of U.S. legal culture:

The proliferation and growth of business law firms appears to be the most successful or even the only successful legal transplant from the north into the south. This success is even more striking because of the strong European legal traditions—or legal

229. Drake, *supra* note 48, at xix (discussing the impact that “money doctors” have had on “complex domestic groups, power relations, government, and national developments within the recipient countries,” including promotion of the “concentration, urbanization, and institutionalization of Latin American economies along paths previously traveled by the United States,” allowing the republics to become “more deeply integrated into twentieth-century world capitalism, their economies more articulated and differentiated as local elites respond to external opportunities”).

230. Dezalay & Garth, *supra* note 39, at 309 (categorizing those who “analyze these debates and activities concerning the production of national and transnational rules and convert them into scholarly theories and descriptions” as “actors in the production of governing rules” and “participants in the contests of expertise and value”).

231. Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS, *supra* note 39, at 12, 19. In another work, Slaughter elaborates,

Each of these networks has specific aims and activities, depending on its subject area, membership, and history, but taken together, they also perform certain common functions. They expand regulatory reach, allowing national government officials to keep up with corporations, civic organizations, and criminals. They build trust and establish relationships among their participants that then create incentives to establish a good reputation and avoid a bad one. These are the conditions essential for long-term cooperation. They exchange regular information about their own activities and develop databases of best practices, or, in the judicial case, different approaches to common legal issues. They offer technical assistance and professional socialization to members from less developed nations, whether regulators, judges, or legislators.

SLAUGHTER, *supra* note 43, at 3–4.

232. DEZALAY & GARTH, *supra* note 5, at 28 (linking economists from Chile, Mexico, Argentina, and Brazil to each other and to the United States through their education, friendship, and approach to economic problems, and noting that “[t]heir careers even overlap through comparable service in the international financial institutions or as visiting or even tenure-track professors in the United States”).

culture—in Latin America, which assigned a marginal role to lawyers who were identified in business.²³³

Still other U.S. groups promote the protection of fundamental human rights, the right to a fair trial, and the presumption of innocence.²³⁴ It is these latter groups that have attracted the continued interest of the Ford Foundation, although its role in legal reform in Chile is quite limited. The Ford Foundation's mission is to strengthen democratic values, reduce poverty and injustice, promote international cooperation, and advance human achievement.²³⁵ From its headquarters for the Andean Region and Southern Cone in Santiago, the Ford Foundation funds projects that seek to strengthen democratic institutions and practices through research, advocacy, and the promotion of rights, particularly related to equity, non-discrimination, and access to education and knowledge.²³⁶

Building on the Ford Foundation's early support of legal clinics,²³⁷ a number of U.S. philanthropic foundations have funded efforts in Latin America, and in Chile in particular, to promote law reform and the strengthening of the rule of law.²³⁸ From 1998 to 2005, the William and Flora Hewlett Foundation had a U.S.-Latin America program with a robust set of initiatives in Chile.²³⁹ At this time, the mission of the Foundation's U.S.-Latin American Relations Program was to improve relations among institutions, individuals, and communities in the Americas in order to promote democratic governance, economic growth with equity, and environmentally sustainable development.²⁴⁰ The Hewlett

233. *Id.* at 198; Kelemen & Sibbitt, *supra* note 22, at 132 (recognizing "a transnational force—American law firms—which accelerated the globalization of American law in the areas where they were active by spreading their practices and pressuring foreign legal service industries to adopt them"); see also Mark Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS, AND OTHERS* 152–76 (Robert Dingwall & Phillip Lewis eds., 1983).

234. See DEZALAY & GARTH, *supra* note 5, at 30 (crediting the "proliferating actors" with the ability to produce "a new law that brings new legal standards for the protection of the environment and for the promotion of human rights"); Dezalay & Garth, *supra* note 39, at 315 (acknowledging a resistance to these legal reforms).

235. FORD FOUND., FORD FOUNDATION ANNUAL REPORT 2005 70 (2005), available at <http://www.fordfound.org/pdfs/impact/ar2005.pdf>.

236. Ford Foundation, Andean Region and Southern Cone, <http://www.fordfound.org/regions/andeanregion/overview> (last visited Aug. 16, 2008).

237. See Wilson, *supra* note 6, at 555.

238. For example, the Tinker Foundation of New York funded projects with Fundación Paz Ciudadana. See COMUNA SEGURA, COMPROMISO 100: DOCUMENTO DESCRIPTIVO FASE UNO—2001 (2001), available at http://www.pazciudadana.cl/upload/areas_info_estrategia/PAZ-ESTRATEGIA_20071114122629.pdf.

239. WILLIAM AND FLORA HEWLETT FOUNDATION, 1999 ANNUAL REPORT 86 (1999), available at <http://www.hewlett.org/AboutUs/AnnualReports/1999AnnReport.htm>.

240. See *id.*

Foundation was focused on continued hemispheric integration and invested in integrated institutional and human-resource infrastructure in order to develop beneficial relations throughout the Hemisphere.²⁴¹ Priority regions of focus were Mexico, the U.S.-Mexico border region, Argentina, Brazil, and Chile. By 2003, the Hewlett Foundation began to withdraw from activities in Argentina, Brazil, and Chile and roll its program into other programs, including Mexican judicial reform and Brazilian air quality projects. Grants concerning rule of law and judicial reform were given to public universities like the University of Chile, independent non-profits in Chile, and private-public university partnerships like the Catholic University of Chile (with California Western School of Law) and Universidad Alberto Hurtado (with San Diego State University). The Hewlett Foundation supported legal scholarship on indigenous rights²⁴² and Alternative Dispute Resolution.²⁴³ It also funded books on evidence²⁴⁴ and law reviews on criminal procedure.²⁴⁵

As yet another form of U.S. legal involvement in Chile, there have also been summer programs for U.S. law students in Chile organized by American University's Washington College of Law, Valparaíso University Law School,²⁴⁶ and a LatCRIT consortium that featured a short workshop in Santiago de Chile²⁴⁷ and the Consortium for Innovative Legal Education.²⁴⁸ Stanford University still has a program that brings Chileans to the United States, as do Yale University, Harvard University, and New York University.²⁴⁹ Loyola Chicago Law School and McGeorge

241. *Id.*

242. For an example of such scholarship, see generally RODRIGO LILLO ET AL., RESOLUCIÓN DE CONFLICTOS EN EL DERECHO MAPUCHE: UN ESTUDIO DESDE LA PERSPECTIVA DEL PLURALISMO JURÍDICO [CONFLICT RESOLUTION IN MAPUCHE LAW: A STUDY FROM THE PERSPECTIVE OF LEGAL PLURALISM] (Universidad Católica de Temuco 2003).

243. For an example, see generally Centro de Resolución Alternativa de Conflictos [Center for Alternative Dispute Resolution], 4 REVISTA CREA (2003).

244. For an example, see generally RODRIGO COLOMA CORREA, LA PRUEBA EN EL NUEVO PROCESO PENAL ORAL [THE TEST OF THE NEW ORAL CRIMINAL PROCEDURE] (2003).

245. See generally Universidad Católica de Temuco: Escuela de Derecho [Temuco Catholic University: Law School], 3 REVISTA DE DERECHO (2002).

246. Valparaíso University School of Law, Summer Overseas Program, <http://www.valpo.edu/law/registrar/summeraway.php> (last visited Mar. 22, 2008).

247. See LatCrit, Critical Global Classroom, <http://www.latcrit.org/> (last visited Sept. 10, 2008) (providing an overview of the program). The LatCrit Critical Global Classroom was cancelled in 2006. *Id.*

248. See California Western School of Law Chile Summer Program 2008, <http://www.cwsl.edu/StudyAbroad/chile/web/index.htm> (last visited May 15, 2008).

249. David Rockefeller Center for Latin American Studies, Harvard University, Mission, http://www.drclas.harvard.edu/regional_office/about/mission (last visited Aug. 16, 2008); New York University, Law Global, <http://www.law.nyu.edu/global/index.htm> (last visited Aug. 16, 2008) (discussing the more than 300 international students and various international professors and judges who come to New York University School of Law to study and teach); Stanford University, Center for Latin American Studies, <http://www.stanford.edu/group/las/about/>

Law School organized a basic workshop on oral advocacy training,²⁵⁰ while California Western School of Law trained almost every public defender and many prosecutors and judges in basic and advanced oral advocacy skills.²⁵¹ New initiatives from California Western School of Law pushed second-generation reforms that introduce judicial innovations like DNA testing,²⁵² computer forensics, digital evidence, drug treatment courts,²⁵³ and problem-oriented policing.²⁵⁴

In essence, the work of the U.S. academic institutions has been to promote reform, provide exchanges with students in both countries, and create activists within the Chilean legal sector to sustain reform efforts.²⁵⁵ As stated by Thomas Carothers,

Probably the most significant accomplishment of U.S. rule-of-law assistance in Latin America since the mid-1980s has been to help push the issue onto the agendas of governments in the region. The goal of improving courts, police, and other basic law-related institutions now stirs up public debate and galvanizes officials' attention. The reasons for this agenda shift are many—citizens' frustration over skyrocketing crime is one major factor—but the U.S. emphasis is certainly one of them.

index.html (last visited June 20, 2008) (discussing, among other things, the Tinker Visiting Professor Program, of which Chilean scholars have been a part); Yale Law School, Latin America, http://www.law.yale.edu/academics/internationallaw_latnamerica.asp (last visited Aug. 16, 2008).

250. See generally Loyola University Chicago, Academics, Cooperative Program with Chile, http://www.luc.edu/law/academics/special/studyabroad/chile_cooperative_pr.html (last visited Aug. 16, 2008) (discussing Loyola's cooperative program with Chile); see also University of the Pacific, McGeorge School of Law, Fred A. Galves, <http://www.mcgeorge.edu/x498.xml> (last visited Aug. 16, 2008) (discussing Professor Galves's teaching experience with foreign law students, including trial advocacy with Chilean prosecutors and defenders).

251. See generally ACCESO Capacitación, Oral Advocacy Workshop, <http://www.proyectoacceso.com/web/guest/programs/capacitacion/oabas> (last visited Aug. 16, 2008); see also Matt Moffett, *Shoeshine Boys in La Paz Need a Good Lawyer*, WALL ST. J. ONLINE, May 8, 2008, <http://online.wsj.com/article/SB121010759340771687.html>.

252. See Proyecto ACCESO, Inocente Project, <http://www.proyectoacceso.com/web/guest/news/inocente> (last visited Mar. 24, 2008).

253. See James Cooper, *Drug Treatment Courts: A Problem-Solving Mechanism to Address the Demand Side of the War on Drugs*, in JUSTICIA PENAL Y ADICCIONES: TRIBUNALES DE TRATAMIENTO COMO ALTERNATIVA A LA SANCIÓN [CRIMINAL JUSTICE AND ADDICTIONS: TREATMENT TRIBUNALS AS AN ALTERNATIVE TO PUNISHMENT] 13 (Paula Hurtado & Ángel Valencia eds., 2007).

254. Subsecretaría de Carabineros [Undersecretary of Police], Gobierno y Carabineros de Chile Realizan Seminario Sobre Programa "Policía Orientada a la Solución de Problemas (POP)" [Chilean Governor and Police Attend Seminar on "Problem Oriented Policing (POP)"] (May 2, 2007), available at <http://www.subsecar.cl/noticias/noticia182.php>.

255. See Sieder, Schjolden & Angell, *supra* note 50, at 1–2 (noting the amount of support that "[n]ongovernmental agencies and networks of activist lawyers are [offering to advance] such processes of legal mobilization" and the role legal globalization is playing in the developments).

Getting the issue onto the agenda is much less than what aid providers have sought to accomplish, but in the long run it may prove an important contribution if Latin American governments and societies are able to sustain their efforts and make some lasting progress.²⁵⁶

Indeed, U.S. legal culture has had a significant impact on the legal reform process in Chile and on the construction of a new legal culture in the post-Pinochet era. Yet, there have been significant challenges to U.S. influence on Chilean legal reform. First, there is the lingering issue of U.S. involvement in plotting the *coup d'état*, or at least tacitly supporting it, against the democratically elected government of Salvador Allende in 1973.²⁵⁷ In 2003, U.S. Secretary of State Colin Powell issued an apology.²⁵⁸ There is also the knock-on effect of anti-globalization protests that have swept Argentina, Bolivia, Ecuador, and other countries around the region, inspired by Cuba and Venezuela.²⁵⁹ Chilean protestors took to the streets in droves to protest globalization and the visit of U.S. President George W. Bush during the Asia-Pacific Economic Cooperation (APEC) summit in Santiago in 2004.²⁶⁰ There is also lingering resentment over strong-arm diplomacy concerning the Chilean vote for a U.N. Security Council resolution in support of the invasion of Iraq by the United States and its allies.²⁶¹ The backdrop to these challenging times for the predominance of U.S. legal culture in Chile has been the general decline of the United States' influence in the face of the ascending influence of the European Union and its Member States.²⁶²

256. CAROTHERS, *supra* note 19, at 171.

257. See generally SIMON COLLIER & WILLIAM F. SATER, A HISTORY OF CHILE: 1808–2002 330–52 (2d ed. 2004); JAMES F. PETRAS & MORRIS H. MORLEY, HOW ALLENDE FELL: A STUDY IN U.S.–CHILEAN RELATIONS (1974).

258. Larry Rohter, *Thousands Demonstrate Against Bush in Santiago*, N.Y. TIMES, Nov. 20, 2004, at A8.

259. See generally TARIQ ALI, PIRATES OF THE CARIBBEAN: AXIS OF HOPE (Verso 2006).

260. See Hector Tobar, *Activists Await Bush at Pacific Summit in Chile*, L.A. TIMES, Nov. 18, 2004, at A3.

261. Colum Lynch, *U.S. Pushed Allies on Iraq, Diplomat Writes: Chilean Envoy to U.N. Recounts Threats of Retaliation in Run-Up to Invasion*, WASH. POST, Mar. 23, 2008, at A11.

262. KAGAN, *supra* note 13, at 60 (exploring the global implications of Europe's unique approach and why it views U.S. unilateralism as a threat and stating that "many Europeans, including many in positions of power, routinely apply Europe's experience to the rest of the world, and sometimes with the evangelical zeal of converts").

V. COMPETITION OR CONVERGENCE: EUROPEAN AND U.S. LEGAL CULTURES IN THE ERA OF GLOBALIZATION

The 1990s saw a prolonged period of legal harmonization, most often punctuated by international agreements.²⁶³ This resulted in increased competition between the legal cultures of the United States and Europe.²⁶⁴ As countries reform their laws, they choose which foreign rules to adopt and/or adapt domestically and which to ignore.²⁶⁵ For instance, this contest has manifested itself in the arena of health and safety standards, with disputes over whose regulations concerning hormones in beef and genetically modified organisms are better.²⁶⁶

The battle has also played out in competition law.²⁶⁷ When General Electric and Honeywell attempted a merger in 2001, General Electric stood to reap the benefits of a \$45 billion deal. The U.S. Department of Justice approved the match, but antitrust authorities in the European

263. See generally Friedman, *supra* note 37.

264. ELLEN MEIKSINS WOOD, *EMPIRE OF CAPITAL* 143 (2005) (announcing that, “[f]or the first time in the history of the modern nation state, the world’s major powers are not engaged in direct geopolitical and military rivalry” but are instead competing in the “capitalist manner”); Sylvia Ostry, *Policy Approaches to System Friction: Convergence Plus*, in *NATIONAL DIVERSITY AND GLOBAL CAPITALISM*, *supra* note 42, at 333, 338 (theorizing that “[o]ne way of reducing system friction and of achieving a level playing field, or *fairness* (a powerful factor in American economic and foreign policy), is to harmonize, that is, to establish one brand of capitalism” (emphasis in original)).

265. Cotterrell, *supra* note 28, at 78 (explaining how lawmakers choose to adopt laws from sophisticated and prestigious sources); see also Rene David, *A Civil Code for Ethiopia: Considerations on the Codification of Civil Law in African Countries*, 37 *TUL. L. REV.* 187, 188 (1963) (offering another explanation for how and why countries mix and match foreign law, that is, “[i]t is probable that the final decision was motivated not so much for juridical arguments as by considerations of a political or cultural order: the desire to counter-balance, by an appeal to other sources, an English or Anglo-American influence which they feared was becoming excessive”).

266. See *At Daggers Drawn*, *ECONOMIST*, May 8, 1999, at 17; see also Paul Geitner & Andrew Pollack, *A Line In the Sand Over WTO’s Modified-Food Ruling*, *INT’L HERALD TRIBUNE*, Feb. 9, 2006, at Finance 3, (arguing that the World Trade Organization’s (WTO) determination that the European Union had breached trade regulations, while resolving the suit brought by the United States, Canada, and Argentina, would do little to harmonize U.S.-E.U. perceptions of genetically modified foods); *US Hits EU, Spares UK in Beef War*, *BBC ONLINE NETWORK*, July 19, 1999, http://news.bbc.co.uk/1/hi/business/the_economy/398526.stm (describing retaliatory import tariffs—approved by the WTO due to the European Union’s ban on hormone-treated beef—levied by the United States on various E.U. products); *WTO To Rule Against EU In Beef Hormone Case*, *ASSOCIATED PRESS*, Mar. 28, 2008, available at <http://www.digtriad.com/news/local/article.aspx?storyid=100723>.

267. Paul Meller, *Microsoft Lashes Out at European Regulator*, *N.Y. TIMES*, Feb. 16, 2006, at C5; see also Mariah Blake, *Europe Faults Apple for “Anticompetitive” iPhone Deals*, *CHRISTIAN SCI. MONITOR*, Nov. 23, 2007, at 6 (characterizing the iPhone conflict as “another sign of the increasingly proactive approach European courts and government agencies are taking when it comes to regulating competition—a fact illustrated most vividly by the recent European Union court decision that forced Microsoft to unbundle its Media Player from its operating system”).

Commission held it up.²⁶⁸ According to U.S. Treasury officials, the failed merger cost an estimated \$75 million.²⁶⁹ On other occasions, the long reach of U.S. legislation has impacted German corporate governance and management-labor relations. In particular, the provisions of the Sarbanes-Oxley Act (disallowing employees from being corporate directors) run completely counter to the role of trade unions in German corporate laws, wherein employees must be members of corporate boards.²⁷⁰ As the WTO negotiates how to address competition law, the contest between the U.S. and European approaches will grow stronger.²⁷¹

The competition among legal cultures is part of the increasing realization that models developed in and by the United States are no longer the only models by which to advance a democratic society and the rule of law.²⁷² For Robert Kagan, the United States remains "mired in history," exercising its power in a world in which security and liberty are still dependant on the possession and use of military might.²⁷³ Europe, on the other hand, has moved into a "post-historical paradise," where peace and prosperity can be secured through laws, rules, and negotiations.²⁷⁴

268. See Thomas J. Horton & Stefan Schmitz, Orrick, Herrington & Sutcliffe LLP, *A Tale of Two Continents: The Coming Clash of the Conflicting Economic Viewpoints in Europe and the United States*, Feb. 17, 2007 (on file with the author).

269. See, e.g., *EU Kills GE-Honeywell*, CNN MONEY, July 3, 2001, http://money.cnn.com/2001/07/03/europe/ge_eu/ (assessing the financial ramifications of the European Union's rejection of the merger for both companies and investors); see also Yeo Jin Chun, *GE-Honeywell Merger Debacle: The Enforcement of Antitrust Competition Laws Across the Atlantic Pond*, 15 N.Y. INT'L L. REV. 61 (2002); Paul Jin, *Turning Competition on its Head: Economic Analysis of the EC's Decision to Bar the GE-Honeywell Merger*, 23 N.W. J. INT'L L. & BUS. 187 (2002); Thomas L. Ruffner, *The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?*, 52 DEPAUL L. REV. 1285 (2003).

270. For an examination of the differences between U.S. and German corporate governance, see Theodore Baums & Kenneth E. Scott, *Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany*, 53 AM. J. COMP. L. 31 (2005); Cooper, *supra* note 40.

271. See Cooper, *supra* note 40.

272. SLAUGHTER, *supra* note 43, at 156 (proposing that the European Union has found its alternative in the "transnational option"—the use of an organized network of national officials of member-states to ensure 'that the actors in charge of the implementation of Community policies behave in a similar manner' (citing Renaud Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, 4 J. EUR. PUB. POL'Y 254 (1997))).

273. KAGAN, *supra* note 13, at 3.

274. *Id.* Notwithstanding the much trumpeted end of Europe with the popular defeat of the European Constitution in France and the Netherlands, the European Union is not going away. See generally Elaine Sciolino, *French Voters Soundly Reject European Union Constitution*, N.Y. TIMES, May 30, 2005, at A1; Doug Saunders, *European Disarray Spreads After Vote*, SAN DIEGO UNION-TRIBUNE, June 1, 2005, at A1.

European power is now about using its soft power—the ability to track and persuade.²⁷⁵

The European Union dispenses more international aid to more countries in the developing world than the United States.²⁷⁶ Europe has more people,²⁷⁷ more money,²⁷⁸ more trade,²⁷⁹ and more votes in international organizations.²⁸⁰ Europe has even begun to compete for greater control over the governance of the Internet.²⁸¹ Moreover, Europe's currency is challenging the hegemony of the U.S. dollar in international financial dealings. According to Russell A. Berman,

The advent of a new global currency based on a European economy as large as that of the United States clearly indicates that the international monetary system will look very different in the 21st century than it did in the dollar-dominated world of the 20th century or the sterling-dominated world of the 19th century.²⁸²

275. Soft power is something with which the United States won the Cold War but then later discarded in favor of military and economic might. See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004).

276. See Europa, *Overviews of the European Union Activities: Development*, http://europa.eu/pol/dev/overview_en.htm (last visited Sept. 12, 2008) (finding that “[m]ore than half the money spent to help poor countries comes from the European Union and its member states, making it the world’s biggest aid donor”).

277. There is evidence that Europe's population is decreasing due to the declining birth-rate. Cf. Joseph Chamie, *Angela Merkel and the Decline of Europe*, *GLOBALIST*, Oct. 13, 2005, available at <http://www.theglobalist.com/DBWeb/StoryId.aspx?StoryId=4783>.

278. Kate Hammer & Julia Werdigier, *Money Goes Far in New York, If You're European*, *N.Y. TIMES*, Dec. 15, 2007, at C1 (reporting that due to the effects of a cheap dollar, “many Europeans are looking at the United States the way some Americans have long viewed Latin America and the Caribbean and, once upon a time, Europe—a cheap place to flex their strong currency”); see *Dollar Hits New Low Against the Euro*, *MSNBC.COM*, Mar. 7, 2008, <http://www.msnbc.msn.com/id/23368471/>.

279. European Commission, *Bilateral Trade Relations, Chile*, http://ec.europa.eu/trade/issues/bilateral/countries/chile/index_en.htm (last visited Oct. 4, 2008) (“Chile’s main trade partner is the [European Union]. The [European Union] is also Chile’s main provider of foreign direct investment (FDI), both in terms of flows and stocks.”).

280. Yet, Member States of the European Union keep their separate votes in certain international organizations, such as the Organization for Economic Cooperation and Development (OECD), the United Nations, the WTO, and even the International Standards Organization. Mattli & Buthe, *supra* note 42, at 1.

281. See Liza Porteus, *Who Should Control the Internet*, *FOXNEWS.COM*, Nov. 10, 2005, available at <http://www.foxnews.com/story/0,2933,175096,00.html>; Aoife White, *EU Wants Shared Control of Internet*, *ASSOCIATED PRESS*, Sept. 30, 2005, available at http://www.breitbart.com/article.php?id=D8CUKA481&show_article=1; see also *US v. EU on Internet Control*, *CBS NEWS*, Sept. 30, 2005, available at <http://www.cbsnews.com/stories/2005/09/30/tech/main892400.shtml>.

282. C. Fred Bergsten, *The Euro and the Dollar: Toward a “Finance G-2”?*, in *THE EURO AT FIVE: READY FOR A GLOBAL ROLE?* 27 (Adam S. Posen ed., 2005).

With this new clout, E.U. officials have come out strongly to advance the European Union as the model for governance.²⁸³ As then-European Commission President Romano Prodi stated, "Europe has a role to play in world 'governance,' a role based on replicating the European experience on a global scale."²⁸⁴ The Europeans believe that they have a better set of solutions for the rest of the world.²⁸⁵ As Robert Kagan has explained:

[t]he transmission of the European miracle to the rest of the world has become Europe's *new mission civilisatrice*. Just as Americans have always believed that they had discovered the secret to human happiness and wished to export it to the rest of the world, so Europeans have a new mission born of their own discovery of perpetual peace.²⁸⁶

A bastion of bureaucracy,²⁸⁷ the European Union also enjoys complicated government and regulation.²⁸⁸ "Eurocrats"²⁸⁹ take pride in their social compact, their health and safety standards, their way of life, and

283. RUSSELL A. BERMAN, *ANTI-AMERICANISM IN EUROPE: A CULTURAL PROBLEM* 77 (2004) (identifying Anti-Americanism as "an ideology to form a postnational European identity . . . it is endogenous: not a response to an outside threat but an aspect of European political and cultural transformation. For the European Union to be credible, it has to carry some meaning and stand for more than a bureaucratic apparatus").

284. KAGAN, *supra* note 13, at 60 (concerning divergent U.S. and European views toward international law and institutions); *see also* MARK LEONARD, *WHY EUROPE WILL RUN THE 21ST CENTURY* (2005) (arguing that the European Union's "network" model is a more ideal form of organization and that the European Union's track record in democratizing and liberalizing Central and Eastern Europe is emblematic of its success as a model).

285. SCHNABEL & ROCCA, *supra* note 17, at xxi-xxii; Stefan A. Schirm, *Europe's Common Foreign and Security Policy: The Politics of Necessity, Viability, and Adequacy*, in *THE EUROPEAN UNION IN THE WORLD COMMUNITY* 78 (Carolyn Rhodes ed., 1998) (suggesting that an E.U. foreign policy goal of the promotion of democracy could "contribute to creating a European identity and thus further the European integration process").

286. KAGAN, *supra* note 13, at 61; Gorm Rye Olsen, *The European Union: An Ad Hoc Policy with a Low Priority*, in *EXPORTING DEMOCRACY* 131, 131 (Peter J. Schraeder ed., 2002) (ranking E.U. desire to export democratic values low on the list of priorities, giving way to "more traditional foreign policy goals, such as ensuring the military security and economic well-being of E.U. Members").

287. Alexei Barrionuevo, *Land of Babble: As Europe Seeks A Stronger Voice, Words Get in Way; New Entrants Stretch Limits of EU's Polyglot Approach; 380 Language Pairs Served; Malta's Translator Shortage*, WALL. ST. J., Jan. 5, 2005, at A1.

288. BERMAN, *supra* note 283, at 10 (characterizing the system in the European Union as a "democracy deficit" because the "political powers have been shifted to a bureaucracy largely shielded from public scrutiny and electoral control"); Volkmar Gessner, *The Transformation of European Legal Cultures*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 513, 514 (finding no evidence of a unified European legal culture on which to base "E.C. Law").

289. *See Eurocrats Unite!*, TIME, Mar. 13, 1964, available at <http://www.time.com/time/magazine/article/0,9171,828285,00.html>.

the civil society they have built.²⁹⁰ Since it was founded in 1957 with the Treaty of Rome,²⁹¹ the European Union has focused on legal harmonization through the proliferation of multilateral decision-making institutions and international agreements so as to build a supranational State.²⁹² Notes Jeremy Rifkin,

The [European Union]'s very legitimacy lies not in the control of territory or the ability to tax its citizens or mobilize police or the military force to exact obedience but, rather, in a code of conduct, conditioned by universal human rights and operationalized through statutes, regulations, and directives and, most important, by a continuous process of engagement, discourse, and negotiation with multiple players operated at the local, regional, national, transnational and global levels.²⁹³

While it is clear that the United States and many of the Member States of the European Union have diverged in their policies concerning Iraq,²⁹⁴ how to enforce U.N. Security Council sanctions,²⁹⁵ and the broader war on terror,²⁹⁶ some observers have also signaled a divergence in terms of values.²⁹⁷ This divergence has been attended by a growing

290. David Brooks, *Sustaining the European Way of Life*, SAN DIEGO UNION-TRIBUNE, June 3, 2005, at B8 (confirming that the traditional U.S. liberal's wishlist has been largely enacted in Europe, "generous welfare measures, ample labor protections, highly progressive tax rates, single-payer health care systems, zoning restrictions to limit big retailers and cradle-to-grave middle class subsidies supporting everything from child care to pension security").

291. See Treaty Establishing the European Economic Community, *supra* note 203.

292. Cf. Saunders, *supra* note 274.

293. JEREMY RIFKIN, *THE EUROPEAN DREAM* 209 (2004).

294. ALBERTO ALESINA & FRANCESCO GIAVAZZI, *THE FUTURE OF EUROPE: REFORM OR DECLINE* 1 (2007) (attributing the "cross-Atlantic animosity" not only to animosity toward President Bush, or to U.S. irritation with French and German policies on Iraq, but more to the growing differences between the regions); BARK, *supra* note 15, at 211–12 (reporting on how the German campaigns of Chancellor Gerhard Schröder and Minister of Justice Herta Däubler-Gmelin focused on President George W. Bush's Iraq war policies); KAGAN, *supra* note 13, at 37 (explaining how divergent the views of the European Union and the United States are on the issue of Iraq, and, more broadly, on the issue of how to govern and about "the role of international institutions, about the proper balance between the use of force and the use of diplomacy in international affairs").

295. Steven R. Weisman, *Europe Resists U.S. Push to Curb Iran Ties*, N.Y. TIMES, Jan. 31, 2007, at A1. The tension was even displayed by the tepid U.S. support for Germany's attempt to secure a permanent seat on the U.N. Security Council. See Glenn Kessler, *Rice Pans Handing Germany Permanent U.N. Council Slot*, SAN DIEGO UNION-TRIBUNE, May 19, 2005, at A13.

296. Jan Silva, *EU Lawmakers Demand Answers on Possible CIA Secret Prisons*, SAN DIEGO UNION-TRIBUNE, Dec. 2, 2005, at A15.

297. STEPHEN F. SZABO, *PARTING WAYS: THE CRISIS IN GERMAN-AMERICAN RELATIONS* 137 (2004) (noting that, "[a]ll the shared values and the extensive economic network that bound the United States and Europe could not prevent the astonishingly rapid deterioration of relations between nations that had been close allies for fifty years"); Press Release, Office of the Press Secretary, President Hosts United States—European Union Summit, June 20, 2005,

anti-Americanism that has proven useful in the gradual definition of a new European identity.²⁹⁸ This ideology of anti-Americanism has been the focal point for manifestations of Europe's divergence from the United States.²⁹⁹ At times, even European leaders do not know if Europe is a competitor to the United States or an ally.³⁰⁰ This competition, however, has greatly dissipated from previous levels, with the exit of Gerhard Schröder from Germany's leadership and the arrival of Angela Merkel.³⁰¹

available at <http://www.whitehouse.gov/news/releases/2005/06/20050620-19.html>. U.S. President George W. Bush stated that "relations with Europe are important relations, and they've—because we do share values. And they're universal values—they're not American values or European values, they're universal values. And those values, being universal, ought to be applied everywhere. And that's human rights, human dignity, rule of law, transparency when it comes to government, decency. And, obviously, if the [European Union and the United States] speak with one voice on these issues, it's more likely to hear—people will hear it." *Id.*

298. BERMAN, *supra* note 283 (detailing the elements, both cultural and irrational, of anti-American sentiment in Europe); see also SCHNABEL & ROCCA, *supra* note 17, at 89 (asserting that "the all-too-popular idea of Europe as Not-America undermines the relationship between the [United States] and the [European Union] and gives a distorted image of Europe's own character. Defining European identity in this way means exaggerating or overemphasizing the differences in values between Europe and America").

299. BERMAN, *supra* note 283, at xii (demonstrating how the process of post-Cold War European unification has become defined by a broad-based irrational anti-American sentiment); Elaine Ganley, *European Leaders Wary of Google's Digital Library*, SAN DIEGO UNION-TRIBUNE, May 6, 2005, at C5. The anti-Americanism of Europeans has also been fodder for U.S. pundits who view U.S. defense guarantees of Europe as costly. See Robert Burns, *U.S. May Close Half of Its Bases in Europe*, ASSOCIATED PRESS, May 10, 2005, available at http://findarticles.com/p/articles/mi_qn4188/is_20050510/ai_n14620626 (reporting that the Defense Department was planning the withdrawals of tens of thousands of U.S. troops from Europe); see also Robert J. Samuelson, *Modern Europe Withers on the Vine*, SAN DIEGO UNION-TRIBUNE, June 15, 2005, at B8 (declaring that "Europe is history's has-been. It isn't a strong American ally, not simply because it disagrees with some U.S. policies, but also because it doesn't want to make the commitments required of a strong ally"); Craig S. Smith, *NATO Agrees to U.S. Proposals to Revamp Alliance*, N.Y. TIMES, June 13, 2003, at A3.

300. Volmer, *supra* note 8 (announcing his interest in "strengthening all three sides of the transatlantic triangle between Europe, Latin America, and North America" and his government's intention of observing carefully and monitoring the creation of the pan-American free trade zone, ALCA"); see also Matt Crenson, *2 Americans, German Share Nobel Prize for Physics*, SAN DIEGO UNION-TRIBUNE, Oct. 5, 2005, at A3.

301. SZABO, *supra* note 297, at 1 (explaining that the "German-American split was part of a larger crisis in transatlantic relations that began with the end of the Cold War, increased with the coming to power of the Bush administration, and erupted with ferocity in the fall of 2002 over the war in Iraq"). The installation of Conservative Angela Merkel as Germany's first female Chancellor indicates that this split may have been but a brief interlude. David McHugh, *Germany Installs 1st Female Leader*, SAN DIEGO UNION-TRIBUNE, Nov. 23, 2005, at A15. On her first visit to the United States as German Chancellor, Angela Merkel took great pains to heal the rifts with the Bush administration that plagued her predecessor's government, particularly with respect to the invasion of Iraq. Press Release, Office of the Press Secretary, President Welcomes German Chancellor Merkel to the White House, Jan. 13, 2006, available at <http://www.whitehouse.gov/news/releases/2006/01/20060113-1.html>; see also *Angela's Ashes*, ECONOMIST, Oct. 7, 2006, at 13; *Bush, Merkel United on Iran's Nuclear Threat*, CNN.COM, Jan. 13, 2006, <http://www.cnn.com/2006/WORLD/meast/01/13/iran.nuclear/>

Such ideological competition may also apply with respect to U.S. and E.U. approaches to legal reform in Latin America. The transition of criminal procedures in Latin America may be one place to view this phenomenon.³⁰² For many decades, the U.S. legal system, with its relatively transparent and fair criminal procedures, has been exported to other countries as part of the overall democratic governance package that USAID promoted.³⁰³ Likewise, foreign lawyers have looked to U.S. legal institutions for credibility and pedigree.³⁰⁴ The United States focused its assistance in the area of prosecution of drug trafficking and other activities of organized crime through the Office of Overseas Prosecutorial Development and Assistance and Training (OPDAT).³⁰⁵

By the mid-1990s, however, the United States was no longer the only player in rule of law assistance and “[t]he rule of law has become a new rallying cry for global missionaries.”³⁰⁶ Once the Germans had enjoyed success in reunifying East and West Germany after 1991, they too looked abroad to spread their influence. With the successes of GTZ and German academicians, German legal culture spread in Chile and other Southern Cone countries. Outside of drug trafficking, the Germans have been able to dominate the training of police officers, prosecutors, and the authorities in charge of the prison system. Public defense work, however, has been left to U.S. legal reform specialists. It is important to note that

index.html; Jim Hoagland, *Merkel's Middle Way: Chancellor Charting New Role for Germany*, WASH. POST, Jan. 19, 2006, at A19 (discussing the new German Chancellor's quest to “end three years of strained if not hostile relations between Washington and Berlin”). There are, however, some hopes for renewed efforts at getting a European Constitution completed and approved. Dan Bilefsky, *German Leader Vows to Revive Constitution For Europe*, N.Y. TIMES, Jan. 18, 2007, at A3; Mark Landler, *German Leader's Status Grows as Voice of Europe*, N.Y. TIMES, Jan. 12, 2007, at A9.

302. MERRYMAN, *supra* note 6, at 124 (offering a discussion on the similarities between substantive criminal law in developed, capitalist civil law countries and that in common law countries, the same kinds of actions are considered criminal, and the same general approaches to punishment are discussed and debated throughout Western culture).

303. KAGAN, *supra* note 13, at 37 (considering divergent U.S. and European views toward international law and institutions and finding that “[t]he proof of the transcendent importance of the American experiment would be found not only in the continual perfection of American institutions at home but also in the spread of American influence in the world”).

304. Bryant G. Garth & Yves Dezalay, *Introduction*, in GLOBAL PRESCRIPTIONS, *supra* note 39, at 1, 1–2 (explaining that “[t]he consensus is furthered by the activities of policymakers in the south who studied law in the United States as part of the first law and development movement, and by numerous individuals from the south who now deem a U.S. degree indispensable for a career in politics, the law, business, or the academy”).

305. U.S. Dep’t of Justice, Office of Overseas Prosecutorial Development, Assistance and Training—Mission, <http://www.usdoj.gov/criminal/opdat/mission/mission.html> (last visited Mar. 30, 2008).

306. Garth & Dezalay, *supra* note 304, at 1.

in Germany, public defenders do not exist,³⁰⁷ meaning that U.S. influence over anything more than their existence may be only by default.

The attraction of German legal models and law enforcement techniques has to do with a social pact with industry, government, and attorneys³⁰⁸ that is more closely aligned to the "corporatist" models in place in Chile and elsewhere in Latin America.³⁰⁹ It also has to do with the post-war construction of Germany's rule of law, which incorporated the best of European Community legal precepts and, outside of the Third Reich's gangster State, a long history of legal tradition.³¹⁰

Yet, it is probably incorrect to refer to Germany's legal culture as homogenous.³¹¹ Likewise, the competition that may exist between German (or European) legal culture and U.S. legal culture is not so easily defined. German legal culture is itself a *mélange* of influences.³¹² It may be more accurate to refer to the German legal culture as a mixed system, particularly in criminal procedure.³¹³ The German legal culture includes some French customs and practices,³¹⁴ as well as some elements of

307. Germany does not have established public defenders, but the state has to provide an attorney at law as a defender for an accused who does not have the financial resources to pay for their own attorney. *Strafproceßordnung [StPO] [Criminal Procedure Code] §§ 140(2), 141, 142(1) (F.R.G.)*.

308. See Dietrich Rueschemeyer, *State, Capitalism, and the Organization of Legal Counsel: Examining an Extreme Case—the Prussian Bar, 1700–1914*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM*, *supra* note 52, 207 (discussing the long history of close relations among attorneys, which were, in nineteenth-century Prussia, "a small and close-knit group of civil servants"); see generally Kenneth F. Ledford, *Lawyers and the Limits of Liberalism: the German Bar in the Weimar Republic*, in *LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM*, *supra* note 52, at 229.

309. HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT "ISM"* 42 (1997).

310. Jean-Paul Jacqué, *The Role of Law in European Integration*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 501, 501 (discussing the role of the 1973 Declaration on European Identity in shaping the rule of law in the post-World War II Federal Republic of Germany).

311. Dyson, *supra* note 25, at 392–95 (noting that German business culture is also mixed and that "[o]ne of the most distinctive characteristics of post-war German business culture is the combination of respect for a market economy with a strong corporatist outlook within industry").

312. Rueschemeyer, *supra* note 308, at 227 (noting the long-running commitment of lawyers in nineteenth century Prussia, and other German states, to liberal ideas).

313. Klaus Moritz, *The Contribution of Honorary Judges to Labour Conflict Resolution in Germany and France*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 322, 327 (explaining the German reorganization of the inquisitional process, which included the "introduction of public oral proceedings, the creation of a public prosecutor's office and independence of the judges . . . reduc[ing] the need for exercising bourgeois control over the judicial system through the use of jurors").

314. Halliday & Karpik, *supra* note 52, at 351 (noting the "imposition of the Napoleonic Code[, which] was greeted as an emancipatory document by many German principalities because it weakened local and traditional norms and instituted certain rights").

Anglo-American influence.³¹⁵ Moreover, as U.S. forces occupied Germany for years after the Second World War and rebuilt Germany with the Marshall Plan, the United States influenced the drafting of the German Constitution after World War II as well.³¹⁶

In the economic field, there may not be strict competition between U.S. and European influences, but there may still exist small discrepancies between technocrats, who argue over the benefits of European state-interventionist policies, and those who subscribe to more U.S. free-market principles.³¹⁷ Others do not see the divergence concerning economics at all, claiming that the mantra from London and Paris is like that from Washington, D.C.³¹⁸ Among “developed” legal cultures, the so-called civilized nations³¹⁹ show a trend toward legal convergence,³²⁰ as evidenced by the priority that the World Bank and other international agencies place on the rule of law.³²¹

Indeed, the competition between legal cultures such as that between Europe and the United States generally may be overblown.³²² It is too simple to just speak of one legal culture having a monopoly on legal influence,³²³ and there are areas of commonality shared by European (here, specifically German) and U.S. legal cultures. The protection of civil and

315. Helen Silving, *Stare Decisis in the Civil and in the Common Law*, in *EUROPEAN LEGAL CULTURES*, *supra* note 19, at 141, 143.

316. The Allies (the United States, France, and Great Britain) instructed the German Provisional Government to draft a constitution that included the requirements of the Allies. Once completed, the draft was submitted to the Allies for their approval. See Gudrun Kruij, *Stimmen des 20. Jahrhunderts [Voices of the 20th Century]* (Aug. 1998), available at http://www.swbv.uni-konstanz.de/multimedia/mmarchiv/dra_cd_4_1998_info.html.

317. Peter Hakim, *The Uneasy Americas*, 80 *FOREIGN AFF.* 46, 48 (2001) (noting that “[a]lthough no American country has yet retreated from market economic policies as a result, doubts have multiplied about the benefits of free trade and about the pace and breadth of the economic reforms long advocated by Washington”).

318. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 3 (2000) (finding that the advice from U.S. and European leaders is much the same: “Stabilize your currencies, hang tough, ignore the food riots, and wait patiently for the foreign investors to return”).

319. See Statute for the International Court of Justice art. 38(1)(c), June 26, 1945, 59 *Stat.* 1055, 33 *U.N.T.S.* 993.

320. Friedman, *supra* note 37, at 73 (defining convergence as “a natural process, in societies that are moving along the same general paths”).

321. Garth & Dezalay, *supra* note 304, at 2 (finding that a consensus has emerged among policymakers and academics, and “national and multilateral agencies are investing much more in the rule of law [today] than they did in the earlier period”).

322. See SCHNABEL & ROCCA, *supra* note 17, at 89 (asserting that the differences between the United States and the European Union are exaggerated and overemphasized).

323. Kozolchyk, *supra* note 41, at xiii (noting the debt Latin American legal doctrine owes to French, German, Italian, and U.S. sources); Nelken, *supra* note 36, at 32 (asserting that “[g]lobalization is unlikely to impose any one existing pattern of legal culture”); Wieacker, *supra* note 21, at 48 (reminding the reader that Europeans have no “monopoly on legal culture”).

human rights is of paramount importance—something that both legal cultures share.³²⁴ They share the primacy of contracts and that they should be enforced.³²⁵ The presumption of innocence³²⁶ is fundamental to their developed legal systems, as is the right to legal representation.³²⁷ All of this comes from the shared belief in the right to a fair trial³²⁸ and is grounded in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Helsinki Final Act.³²⁹

It is through these shared values that much progress in terms of laying foundations for sustainable reform efforts can be built.³³⁰ No program that exemplifies the three-way partnership is more pressing than the Post-Graduate Diploma Program in the Rule of Law and Access to Justice (now called, in Spanish, *Los nuevos desafíos del estado de derecho*), which brings together the legal cultures of Chile, Germany, and the United States.³³¹ In the program, European legal culture is supplied by GTZ, the Konrad Adenauer Foundation, and the Heidelberg Center for Latin America.³³² U.S. legal culture emanates from judges and policing

324. Compare GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] arts. 1–19 (F.R.G.) (federal constitution) (declaring “Grundrechte,” or basic rights) [hereinafter GRUNDGESETZ], with U.S. CONST. amends. I–VIII (same).

325. See, e.g., Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 1896, Reichsgesetzblatt [RGBL] 195, as amended, § 145 (F.R.G.) (binding effects of offers).

326. See generally GRUNDGESETZ art. 20, as confirmed by Bundesverfassungsgericht [BVerfG] [Constitutional Court] Dec. 15, 1965, 19 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 343 (F.R.G.). Also, a German district attorney has to search for proof that shows that the accused is innocent. Strafprozeßordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, as amended, § 160(2) (F.R.G.) [hereinafter Strafprozeßordnung].

327. See generally Strafprozeßordnung, §§ 141–42.

328. See GRUNDGESETZ arts. 2, 20(III); see also BverfG, May 4, 2004, 110 BverfGE 339, available at http://www.bverfg.de/entscheidungen/rs20040504_lbvr189203.html.

329. Conference on Security and Cooperation in Europe, Final Act, Aug. 1, 1975, 14 I.L.M. 1314 (Helsinki Final Act); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

330. Nelken, *supra* note 36, at 24 (noting that “[s]ome of the groups and individuals who are involved in legal transfers work to a common purpose, as in the earlier [U.S.] ‘law and development’ movement of the 1960s or the so-called ‘Chicago Boys’ combination of economic realism and legal idealism. Others compete politically, socially, and professionally”).

331. See generally Universidad de Chile, Los Nuevos Desafíos del Estado de Derecho [New Challenges for the Rule of Law], http://www.derecho.uchile.cl/postgrado/diplomas/estado_derecho_reformas_justicia_2006.htm (last visited Mar. 25, 2008). In 2007, the program was expanded to Paraguay. See Diplomado Internacional—El Estado de Derecho en el Siglo XXI [International Diploma—The Rule of Law in the Twenty-First Century], <http://www.diplomadoestadodederecho.com/> (last visited Sept. 8, 2008).

332. See Press Release, Heidelberg Center for Latin America, Diplomado Internacional—Los Nuevos Desafíos del Estado de Derecho [International Diploma—New Challenges for the Rule of Law], available at http://www.heidelberg-center.uni-hd.de/download/diplointer_clausura_derecho.pdf (last visited Sept. 8, 2008).

and constitutional experts of California Western School of Law.³³³ The Chilean faculty members come from a broad swath of the leading academicians and practitioners in Chile as well. Since 2004, this trinational postgraduate program has brought tools of analysis and some pedagogy to the exercise of legal reform through lectures and workshops for Chilean legal professionals, diplomats, politicians, and journalists, all related to legal areas subject to the reform process.³³⁴ The opinions and approaches represented from these three distinct legal cultures are richly diverse, yet all share the objective of exploring the best methodologies to solve modernity's most pressing societal ills.³³⁵ A fourth legal culture, perhaps a synthesis of legal cultures, may develop in time.³³⁶

VI. CONCLUSION: THE ETHICS OF LEGAL TRANSPLANTATION

Regardless, however, of the competition among legal cultures, the very ethics of legal transplantation should be re-examined.³³⁷ At times, access to the resources of foreign governments, aid agencies, and

333. See Press Release, Heidelberg Center for Latin America, Three Countries Launch Comparative Law Post-Graduate Diploma (June 2, 2003), available at http://www.rzuser.uni-hd.de/~p00/english/presse_condor210504.html.

334. Chileans too are increasingly involved in legal reform projects in other States in the region. They have undertaken judicial reform assistance in Costa Rica, the Dominican Republic, Panama, and Peru. Given Chile's success in implementing the criminal procedure reform in a few short years, Chilean lawyers, judges, and legal educators are much in demand elsewhere in Latin America, consulting for ministries of justice eager to repeat Chile's successful implementation of criminal procedure reforms. See Abogados Creativos Colaborando para Encontrar Soluciones Optimas [ACCESO], ACCESO Director Lectures at CEDEP in Asuncion, Paraguay for Post-Graduate Program Closing, <http://proyectoacceso.com/web/guest/news/cedep> (last visited Oct. 9, 2008) (describing how the University of Chile and California Western School of Law worked together to reform the rule of law in Chile and now are expanding to Paraguay); see also CALPC & CEPECAL, Taller de Abogacía Oral "Destrezas en un Juicio Oral," <http://www.calpc.net/pagprincipal.htm> (last visited Oct. 13, 2008); Defensoría, Ponencia de la Defensoría Obtiene Primer Lugar en X Congreso Latinoamericano de Auditoría (Aug. 28, 2007), <http://www.defensoriapenal.cl/interior/noticias/dpp.php?id=3525> (last visited Oct. 13, 2008); Defensoría, Representante de la Corte Suprema de Panamá visitó la Defensoría (Aug. 14, 2007), <http://www.defensoriapenal.cl/interior/noticias/dpp.php?id=3500> (last visited Oct. 13, 2008); Defensoría, Estudiantes de Derecho Darán a Conocer Labor de la Defensoría en el XX Congreso Latinoamericano de Derecho Penal y Criminología (Sept. 11, 2008), <http://www.defensoriapenal.cl/interior/noticias/dpp.php?id=4171> (last visited Oct. 13, 2008).

335. See EL ESTADO DE DERECHO Y LA REFORMAS A LA JUSTICIA [THE STATE OF LAW AND JUSTICE REFORMS] (James Cooper et al. eds., 2004).

336. AGUSTÍN GORDILLO, THE FUTURE OF LATIN AMERICA: CAN THE EU HELP? 23–24 (2003) (hoping for "a convergence of civilizations in Latin America, with the help of Europe and the United States; a new culture emerging that improves what we now have in Latin America. Not a new European-(North) American civilization, but a new culture emerging in Latin America with some influence from those kinds of civilization" (emphasis in original)).

337. Nelken, *supra* note 36, at 35.

foundations can assist in the internal power struggles over policy directions.³³⁸ Legal reforms have indeed been used to further political gain.³³⁹ In addition, there are pressing issues concerning the amount of local knowledge to be integrated and the degree to which foreign influence should be permitted at all.³⁴⁰ Peruvian sociologist Hernando de Soto agrees: "[C]reating an integrated system is not about drafting laws and regulations that look good on paper but rather about designing norms that are rooted in people's beliefs and are thus more likely to be obeyed and enforced."³⁴¹ Professor Dani Rodrik provides empirical support for his argument that a well-designed strategy for institution building should take into account "local knowledge" and should not "over-emphasize best-practice 'blueprints'" observed in developed countries at the expense of local participation and experimentation.³⁴² Indeed, "for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law."³⁴³

338. See DEZALAY & GARTH, *supra* note 5, at 7 (finding that "[f]oreign expertise is used . . . to fight against opponents for control over state power").

339. See BUSCAGLIA, DAKOLIAS & RATLIFF, *supra* note 65. The authors explain that

[m]any of the legal reforms carried out in Latin American history had nothing to do with a domestic will to improve the nation but were rather the result of the convergence of international pressures on dominant domestic groups and the latter's decisions to do what they calculated was in their own private, family, and group interests. For example, in the past institutions have been transplanted from the United States or Europe or both because of the weight of international influence and prestige."

Id. at 17.

340. Cotterrell, *supra* note 28, at 79 (describing a legal transplant as successful only if "it proves consistent with these matters of culture in the recipient environment or reshapes them in conformity with the cultural pre-suppositions of the transplanted law").

341. DE SOTO, *supra* note 318, at 159.

342. Dani Rodrik, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 *STUD. COMP. INT'L DEV.* 3 (2000); see also Javier Alcalde, *Differential Impact of American Political and Economic Institutions on Latin America*, in *THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF LATIN AMERICA*, *supra* note 105, at 97, 105-06 (finding problems in Latin America, where "imported laws from France and from the United States . . . were really inapplicable[, it was] . . . impossible to apply these laws to the social context, [and] easier for the bureaucracy and for the people not to observe these laws and to ignore them").

343. Berkowitz, Pistor & Richard, *supra* note 64, at 167. *But see* William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 *AM. J. COMP. L.* 489, 490 (1995) (undermining the theory that law depends on the context in which it is implemented and thus suggesting that the "legal rules can be transported from society to society . . ."); Reed Brody, *International Aspects of Current Efforts at Judicial Reform: Undermining Justice in Haiti*, in *THE (UN)RULE OF LAW & THE UNDERPRIVILEGED IN LATIN AMERICA*, *supra* note 77, at 227, 227 (asserting that, although this principle is often ignored by those assisting the reform, "[i]nternational assistance to judicial reform, like all international development assistance, must be shaped by those who will be most immediately affected"); see also Gunther

The wholesale adoption of foreign models can mean the abdication of responsibility by local stakeholders, lackluster support for reforms, and lack of ownership in, or even resistance to, institutional change.³⁴⁴ Toward the end of his term in office, Chilean President Ricardo Lagos wrote, "We often copy only the accessories, fashion, and the customs, without changing how we face the world, how we create or produce. Many times do we fail while walking at the same pace as the world's conscience, the objectives and principles of which have deepened throughout the years."³⁴⁵

This may be why, across the Western Hemisphere, major challenges remain for the judicial sector.³⁴⁶ There is also the issue of sequencing—the order in which reforms have been promulgated.³⁴⁷ The early focus on privatization and deregulation schemes as part of the economic reforms

Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

344. Nelken, *supra* note 36, at 35–36 (measuring a successful legal transplant by its complete acceptance into the "legal and political culture which has imported it"); see Friedman, *supra* note 37, at 71–72 (noting that the weakness of "[h]armonization and model law-making," is that they "work only through persuasion; there is no political force capable of imposing models on States").

345. RICARDO LAGOS ESCOBAR, *LA DEMOCRACIA EN AMÉRICA LATINA: HACIA UNA DEMOCRACIA DE CIUDADANAS Y CIUDADANOS* [DEMOCRACY IN LATIN AMERICA: TOWARDS A CITIZENS' DEMOCRACY] 10 (2004) ("Muchas veces copiamos sólo lo accesorio, la moda y las costumbres, sin cambiar nuestra manera de pararnos frente al mundo, de crear, de producir. Fallamos muchas veces en caminar al mismo paso que la conciencia del mundo, cuyos objetivos y principios se han profundizado a lo largo de los años.").

346. Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003). The continued problems include the limited independence of the judicial power, inefficient allocation of resources to operate the system causing backlogs in the administration of cases, and providing an opening for corruption, cumbersome legal procedures, inadequate management of courthouses, and legal cases, deficient policies for selection and training of personnel, quasi impunity or feeble sanctions to anti-ethical conduct, and the limited scope of alternative dispute resolution and access mechanisms for low-income sectors and minority groups. Fuentes-Hernández, *supra* note 89, at 44 (proposing that legal education in Latin America be redesigned to include an interdisciplinary curriculum educating law students in the values of democracy and on practical methods for how to contribute to the region's social and economic development).

347. Timing has been a constant issue concerning development assistance from the developed world. See, e.g., Jeffrey D. Sachs, *Russia's Struggle with Stabilization: Conceptual Issues and Evidence*, in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS (Michael Bruno & Boris Pleskovic eds., 1995). For Professor Sachs, the sequencing of reforms is of utmost importance:

Many discussions of economic reform, and of Western economic assistance to Russia, do not take adequate account of the financial, political, and administrative weaknesses of the new Russian state. Many reform strategies would have the state undertake subtle and complex duties even when it is unable to fulfill much simpler and basic tasks If the weaknesses of the Russian state are understood more clearly, the appropriate roles and *timing* of Western assistance are put in a more helpful light.

were undertaken before legal reform efforts had been started, let alone completed. The result was the wholesale looting of national treasuries as state assets were sold off in corrupt regulation and bidding processes. The better approach is to first build the institutions that maintain the rule of law and then focus on undertaking economic deregulation and privatization to open markets, with watchdog organizations and independent judiciaries to monitor these processes.

The reforms required by the Washington Consensus have been implemented in many parts of Latin America, often resulting in economic hardship for the working class.³⁴⁸ That the United States pushed this development agenda has injured its credibility among the policy-making elite and its popularity among the masses.³⁴⁹ While economic growth did result in some cases, it came at a large expense for the lower socio-

348. REID, *supra* note 7 (discussing how the Washington Consensus and the policies of the International Monetary Fund in Latin America “led to an increase in poverty, inequality, unemployment and the informal economy across the region,” and how “through privatisation and free trade they enriched a few at the expense of the many . . .”); Luis Reygadas, *Latin America: Persistent Inequality and Recent Transformations*, in *LATIN AMERICA AFTER NEOLIBERALISM: TURNING THE TIDE IN THE 21ST CENTURY?* 126 (Eric Hershberg & Fred Rosen eds., 2006) (“During the 1990s, average incomes increased, but these improvements were unequally distributed: the income of employers rose from 25 times the poverty rate to 34 times that figure, whereas that of workers rose only from 3.5 to 4.3 times the poverty rate.” (citing Alejandro Portes & Kelly Hoffman, *Latin American Class Structures: Their Composition and Change During the Neoliberal Era*, 38 *LATIN AM. RES. REV.* 41, 55 (2003))). Latin America has greater income inequality than any other region in the world. Moreover, the richest people of Latin America receive a “far higher proportion of [their country’s] income than their counterparts elsewhere in the world.” *Id.* at 120–22; *cf.* Press Release, Economic Commission for Latin America and the Caribbean, *Latin America and the Caribbean Continues to Grow, in Spite of Deteriorating International Economic Context* (Aug. 27, 2008), available at <http://www.eclac.org/cgi-bin/getProd.asp?xml=/prensa/noticias/comunicados/0/33890/P33890.xml&xsl=/prensa/tpl-i/p6f.xsl&base=/tpl-i/top-bottom.xsl> (discussing how GDP, labor markets, and poverty rates have improved throughout Latin America since 2002, but also estimating that because of volatility, uncertainty, rising inflation, and other factors the economic growth of the region would slow down in 2009). According to a recent poll undertaken by *The Economist* and Latinbarómetro, a Chilean polling organization, only a bare majority of Latin Americans remain committed to democracy. *The Stubborn Survival of Frustrated Democrats*, *ECONOMIST*, Nov. 1, 2003, at 18. In 2004, a survey of citizens in Latin American States showed that approximately fifty-five percent of the people supported the return of some form of authoritarian regime, clearly signaling the distrust held of current governing practices and the return to democracy experiences throughout the region. Hector Tobar, *Latin America Losing Faith in Democracy*, *L.A. TIMES*, Apr. 22, 2004, at A3.

349. Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neoliberalism: Law’s Dilemma in Latin America*, in *GLOBAL PRESCRIPTIONS*, *supra* note 39, at 139, 140 (finding the roots of the “current malaise” in the record of “liberalism in Latin America. The combination of market economics and republican rule, far from delivering on their upbeat prophecies, has usually resulted in polarized extremes: social upheaval against market rules or praetorian brutality”).

economic classes, many of whom are from indigenous communities.³⁵⁰ The reforms of the mid-1990s failed to reduce poverty, marginalized the already impoverished working classes, and reduced government-provided social benefits as part of the austerity measures mandated by the International Monetary Fund and other financial institutions.³⁵¹

The failure for the benefits of globalization to be spread throughout the various socio-economic classes in Latin America has forced scholars, international aid agencies, and donor financial institutions to rethink the role that law can play in the development process.³⁵² Professors Erik Jensen and Thomas Heller, in a collection of essays, conclude that efforts to strengthen the rule of law have been channeled inefficiently, due to the questionable incentives facing domestic and international reformers and a lack of concrete information concerning methods to strengthen legal systems.³⁵³ Jensen and Heller decry the “the field-of-dreams approach” of international aid agencies. The authors rightly wonder whether anything more than new courtroom buildings and self-congratulatory praise from aid agencies have resulted.³⁵⁴

Indeed, the globalization of law and the infrastructure to secure capital markets have meant the primacy of international business law and

350. GORDILLO, *supra* note 336, at 31 (arguing that “magical improvement” without “outside managerial” help is unlikely).

351. DE SOTO, *supra* note 318, at 3 (noting that while foreign investment, stable currencies, free trade, transparent banking practices, and the privatization of state-owned industries are desirable, “we continually forget that global capitalism has been tried before. In Latin America, for example, reforms directed at creating capitalist systems have been tried at least four times since independence from Spain in the 1820s. Each time, after the initial euphoria, Latin Americans swung back from capitalist and market economy policies”); *see generally* JOHN RAPLEY, *GLOBALIZATION AND INEQUALITY: NEOLIBERALISM’S DOWNWARD SPIRAL* (2004) (showing that while neoliberal reforms did generate economic growth, this growth has also resulted in negative consequences such as increases in inequality, political instability, right-wing populism, and ethnic and Islamic militancy).

352. *Cf.* GARDNER, *supra* note 52, at 3 (noting that “American legal assistance to the developing world has not been carefully and comprehensively studied Nor have those matters been carefully explored by scholars interested in the role of lawyers and the rule of law in Latin America and the Third World”).

353. Erik G. Jensen & Thomas C. Heller, *Introduction*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 2* (Erik G. Jensen & Thomas C. Heller eds., 2003) (questioning whether the resources poured into rule of law projects are well spent).

354. Linn Hammergren, *International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers*, in *BEYOND COMMON KNOWLEDGE*, *supra* note 353, at 319–20; *see also* GARDNER, *supra* note 52, at 9. Gardner stated that

American lawyers were often poorly equipped for the tasks undertaken. Knowing relatively little of the Third World, they were all the more predisposed to rely on what they did know: American legal culture. As a result American legal assistance was inept, culturally unaware, and sociologically uninformed. It was also ethnocentric, perceiving and assisting the Third World in its own self-image.

U.S. approaches to business law.³⁵⁵ As Professor Lynn Stout has described, "it is a tempting prospect to think that, by modifying their rules to more closely approximate U.S.-style corporate law, such nations might spur the process of economic development."³⁵⁶ This has meant that private law and the structure of rules for the free market become paramount and a legislative priority for governments. Public law, which involves civil rights and the general welfare of society, is of secondary importance. This prescription was designed so that a more secure, predictable, and efficient legal system will first increase economic growth and then lead to democratic governance.³⁵⁷

This sequence of events, however, has generally not occurred: "One view is that U.S.-inspired institutions have not worked in Latin America at all."³⁵⁸ U.S. legal culture is fraught with challenges.³⁵⁹ On the other hand, German legal culture, representing the European ideal, has become a viable and credible source from which to borrow.³⁶⁰ The exportation of German legal culture has been more focused on the development of public law rather than private or business-centric regulation. Since the reunification of Germany, the German government has been able to export much of its legal culture abroad. German ideas and leadership continue to dominate Europe and are increasing in importance around the globe. In January 2007, German Chancellor Angela Merkel was invited to address the World Economic Forum in Davos, Switzerland, not

355. For Ronald Wolf, economic liberalism, as evidenced by *lex mercatoria*, has pushed a new world commercial legal order, also affecting civil rights. See RONALD CHARLES WOLF, *TRADE, AID AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW* 11 (2003) (maintaining that the philosophies of present international institutional organizations, coupled with the fundamentals of international arbitration, have weakened national sovereignty over international trade issues).

356. Lynn A. Stout, *On the Export of U.S.-Style Corporate Fiduciary Duties to Other Cultures: Can a Transplant Take?* 2 (UCLA School of Law, Working Paper No. 02-11, May 21, 2002), available at <http://ssrn.com/abstract=313679>.

357. CAROTHERS, *supra* note 19, at 164; see HERNANDO DE SOTO, *THE OTHER PATH* 159–60 (1990); Hernando de Soto, *Protection of Property Rights and Civil Society*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 73 (Edmundo Jaquín & Fernando Carrillo eds., 1998) (discussing property title reforms in Peru); Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 2–3 (1998).

358. Alcalde, *supra* note 342, at 99.

359. See KAGAN, *supra* note 34, at 126–44; STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS* (1989); see also William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (exploring developments in public interest lawyering).

360. Cf. Carter Dougherty, *Germany Battling Rising Tide of Corporate Corruption*, N.Y. TIMES, Feb. 15, 2007, at C1; Mike Esterl & David Crawford, *In Bribe Probe, Siemens Ex-Staffer Cites Payment*, WALL ST. J., Feb. 8, 2007, at A11.

U.S. President George W. Bush.³⁶¹ It may be that the competition underway in Chile is part of a bigger trend of the waning U.S. influence on legal cultures and policy decisions elsewhere.

361. Mark Landler, *Reworking the A-List: Those Invited to Davis Reflect This Year's Theme of a Shift in Power*, N.Y. TIMES, Jan. 24, 2007, at C1.